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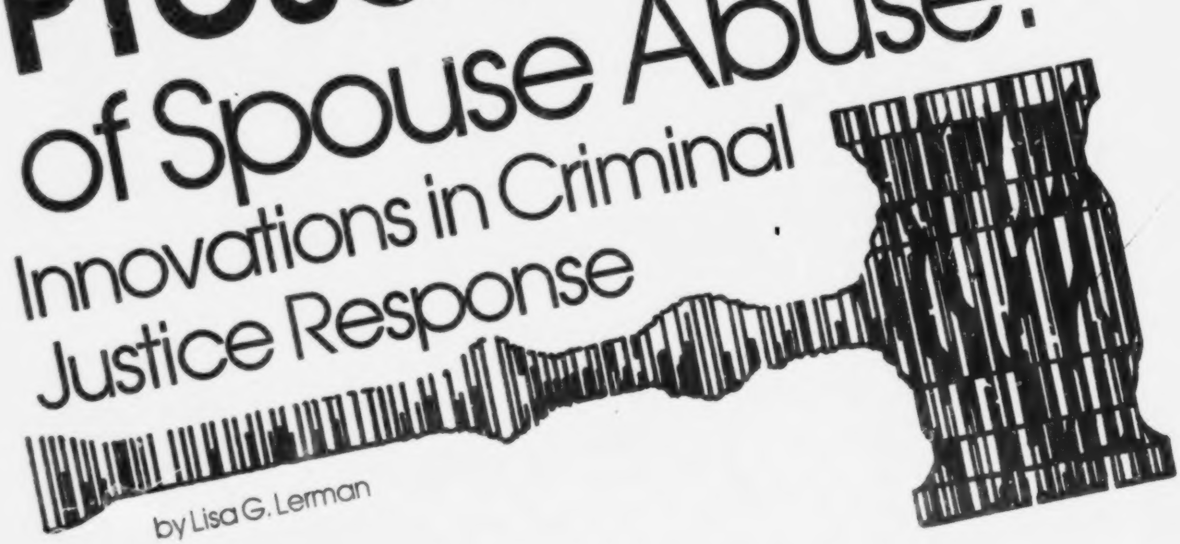
Prosecution of Spouse Abuse

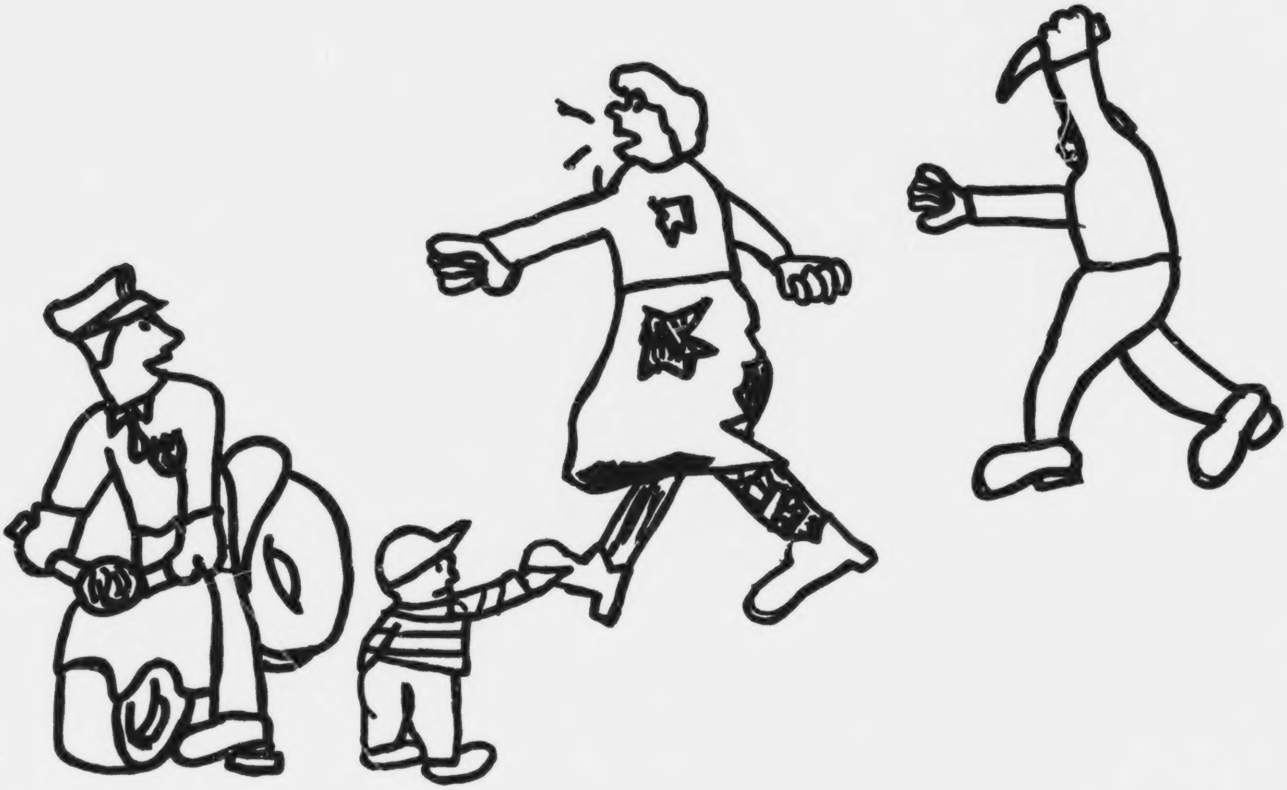
Prosecution of Spouse Abuse: Innovations in Criminal Justice Response



by Lisa G. Lerman

PROSECUTION OF SPOUSE ABUSE

I



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II

PROSECUTION OF SPOUSE ABUSE:
INNOVATIONS IN CRIMINAL JUSTICE RESPONSE

by

Lisa G. Lerman

Drawings by Howard S. Moore

Center for Women Policy Studies
Washington, D. C.
1981

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Prepared under grant numbers 79-TA-AX-0024 and 80-PG-AX-0073 of the Law Enforcement Assistance Administration, U.S. Department of Justice and grant number 90-CW-2189 of the Administration for Children, Youth, and Families, U.S. Department of Health and Human Services.

ACKNOWLEDGEMENTS

Special thanks are extended to CWPS legal interns Susan Wiviott and Franci Livingston for their assistance in the research and writing of this monograph; also, to Karen Crist, Ellen Dunwoody, Margaret Gates, Lajoie Butler, Carolyn Moore, and Leslie Landis for their assistance in editing and production.

The author is grateful to Sally Buckley, Sharon Euster, Jane Greenspan, Marie Hegarty, Barbara Kauffman, Grace Kilbane, Bebe Holzman Kivitz, Jeanine Pirro, JoAnn Pritchett, Barbara Wade, Susan Kaplan, Deborah Talmadge, Helen Smith, and others who shared information about the accomplishments of their programs and the problems they encountered.

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INTRODUCTION

At least a fifth of the homicides and perhaps an even larger proportion of the assaults, batteries, and burglaries in the United States are committed within families or within intimate relationships.[1] Forty percent of female homicide victims are killed by family members.[2] For decades, these crimes have posed a major problem for police, prosecutors, and courts. Many criminal justice officials argue that prosecuting intrafamily crimes is inappropriate because it is disruptive to family life, that it is frustrating because victims often drop charges, and that it is a waste of resources needed for "real crime." During the last two years, as public awareness of the seriousness and pervasiveness of spouse abuse[3] has grown, new legal remedies for battering have been examined and developed to improve the justice system's response to people in chronic violent relationships.

Early efforts on behalf of battered women focused on setting up shelters and hotlines, improving the police response to domestic disturbance calls, and developing legislation providing civil injunctive relief for battered women. Experience with mediation and civil legal remedies led many persons who work with violent families to turn to the criminal courts to obtain leverage over batterers and court orders enforceable by criminal penalties. Much recent attention has focused, therefore, on identifying and eliminating obstacles to criminal prosecution of wife beaters.

This report, written for prosecutors, describes the experiences of those who have solved some of the problems which plague prosecutors who handle spouse abuse cases. It emerged as a product of the Center for Women Policy Studies' Family Violence Project. Under grants from the Law Enforcement Assistance Administration, U. S. Department of Justice, and the Administration for Children, Youth, and Families, U. S. Department of Health and Human Services, the CWPS Family Violence Project has provided technical assistance to federally funded demonstration projects on family violence and disseminated information to service providers nationwide, since 1976.

Early in the project it became apparent that the criminal justice response to violent families was in need of much improvement. In the late 1970's, several prosecutors, some under grants from the Law Enforcement Assistance Administration and others independently, began to experiment with changes in policy and procedure in handling domestic violence cases. Many of these programs have greatly reduced case attrition, increased the conviction rate, and have developed dispositional options through which many batterers have stopped their violent behavior.

This report sets out practical options by which prosecutors can avoid wasting resources on family violence cases and can effectively reduce domestic violence in their communities. Changes are suggested in policies on screening, charging, and dismissal of charges, and in procedure for protecting victims of abuse and preparing them to participate as complaining witnesses. The report also recommends dispositions aimed at rehabilitating batterers and strategies for improving police reporting and investigation of domestic cases.

The information presented was gathered through personal and telephone interviews with prosecutors, police, and judges, and through observation of domestic violence projects with innovative criminal justice components. The problems prosecutors reported experiencing with family violence cases and the procedures they undertook to solve them were relatively uniform, as will be seen in the following chapters.

EARLY TRENDS

One of the earliest studies in the field, "Prosecutorial and Judicial Handling of Family Violence,"[4] was published by Raymond Parnas in 1973. The study examines projects which had developed new ways of processing domestic cases. The projects concentrated on using informal prosecutor hearings, information and referral programs, arbitration, peace bonds, and family courts in order to avoid prosecution of family violence cases and to channel such cases to social service personnel and psychologists. Parnas pointed out that prosecutors are ill-equipped to perform psychoanalysis and cannot deliver the primary counseling services needed by violent families. His conclusion, succinctly stated, is that "effective diversion requires problem-solving techniques rather than simple problem-controlling hardware."[5]

A similar view is articulated by Martha and Henry Field in another 1973 article. Examining criminal justice intervention in domestic violence cases, the Fields suggest that the criminal justice system is ineffective in achieving "deterrence, incapacitation, prevention, retribution, or rehabilitation."[6] They assert that the dynamics of violent intimate relationships "place them more appropriately within the bailiwick of the helping professions."[7] As alternatives to criminal prosecution, they suggest inexpensive divorce, police training, civil suits for personal injury, and counseling services.

RECENT DEVELOPMENTS

A 1977 article by Sue Eisenberg and Patricia Micklow takes a different approach in examining prosecution as a remedy for domestic abuse. The article criticizes crisis intervention and arbitration as relying excessively on mediation or conciliation, with "the effect of deprecating the severity of the complaints," and translating "patterns of repetitive, serious, violent behavior into social disturbances, family spats, or quarrels."[8] The authors suggest several alternatives, including improved reporting of domestic violence calls to identify serious cases, limited use of pretrial detention, clear prosecutor guidelines on the exercise of discretion in filing charges, and judicial insistence on complete records in spouse abuse cases.[9]

Legal Services Attorney Marjory Fields describes in detail in a 1978 article the failure of prosecutors to treat battering cases seriously, and suggests that prosecution is useful because it "restores some of the power balance that the husband has destroyed by his violence,"[10] and encourages improved police response. Fields criticizes remedies focused on mediation as ineffective in resolving serious disputes, particularly in a situation in which one party dominates the other. Fields encourages prosecutors to protect battered wives while criminal charges are pending by requesting conditions on pretrial release, and to understand the positive reasons why battered women often drop charges, including cessation of violence after charges are filed, or her departure to a safer residence and more secure environment while the batterer is in custody.

In 1978, prosecutors from around the country attended a a conference on prosecution of spouse abuse cosponsored by the National District Attorneys Association and the Center for Women Policy Studies. According to the conference report, written by attorney Terry Fromson, conference participants agreed that "spouse assault is just as criminal as violent conduct between other people and should not be treated less seriously by the criminal justice system."[11] The report suggests that problems with victim noncooperation might be reduced through increased services to battered women who become complaining witnesses. It also discusses the use of civil injunctive relief and mediation in cases in which prosecution is deemed inappropriate.

There have been several empirical studies of case processing through the criminal justice system which include material on domestic violence cases and which analyze problems with victim cooperation. These have been conducted by the Institute for Law and Social Research, the Vera Institute of Justice and others. They are examined in detail in Chapter One.

In the last several years, there has been a trend away from mediation, crisis intervention, and similar informal procedures which were used in family violence cases in the early seventies. Recent experimental programs and demonstration projects have increased the use of formal criminal charges in domestic assault cases. Through close coordination with mental health agencies, and through the development of extensive victim services, prosecution has become an appropriate and a desirable legal remedy for many battered women. Innovative programs emphasize the importance of enforcement of court orders, penalties, and rehabilitative measures.

Little has been written about these recent developments, except in manuals and reports produced by individual programs and in local newspaper and magazine accounts of their work. However, several agencies have recently undertaken research on prosecution of domestic violence. The Office of the General Counsel at the U.S. Commission on Civil Rights will release a comprehensive report based on hearings in Arizona and Pennsylvania; the Institute for Social Analysis in Rockville, Maryland, is conducting a study on criminal court processing of nonstranger crime.

In 1978, the Law Enforcement Assistance Administration established a Family Violence Program to assist state and local governments in improving the response of the criminal justice system to domestic assault cases. The LEAA program funded twenty-nine demonstration projects around the country; their mandate was to encourage and coordinate efforts of police, prosecutors, hospitals, mental health, and social service agencies.

Many of these demonstration projects have several components which provide services to violent families, including shelters, prosecution units, mental health facilities, protection order clinics, and public education and training facilities.

Some of the projects which are based in or closely linked with prosecutors' offices have had remarkable success in prosecuting spouse abuse cases. Police referrals to prosecutors have increased, the rate of case attrition due to victim noncooperation has been reduced (in some cases to below ten percent), the rate of convictions or guilty pleas has risen, and recidivism rates have dropped. In some cities, assistance for victims and court-mandated treatment for abusers are now established practices.

The projects funded by the LEAA Family Violence Program are only a small part of the wider grass-roots movement focused on reducing violence within families. They have, however, made significant contributions to the improvement of criminal justice handling of family violence.

Although all of the options presented in this report are replicable, the changes that ought to be implemented in any given community depend on the structure of its criminal justice system, on what programs already exist, and on which agencies are most likely to provide financial and political support for an effort to upgrade prosecution of spouse abuse. For example, if pretrial diversion is unknown to the community, implementation of a diversion program might be more difficult than encouraging more aggressive prosecution. If mental health facilities already receive referrals from the criminal courts, advocacy of court-mandated treatment for abusers might be productive.

Prosecution is not presented as the best or the only legal option which should be available to violent families, but as the most serious and sometimes the only effective action that can be taken to stop violence within a family. At present most battered women do not, in fact, have the option to file charges, because the obstacles posed by the system are so great.

---

1. The FBI Uniform Crime Reports state that of 20,591 homicides in the United States during 1979, 4,077 or 19.8 percent were committed by an immediate family member or a boyfriend or girlfriend of the victim. In 35.3 percent of the cases, the relationship of the parties is unknown, so this figure may be low. FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1979 10-11 (1980).

2. *Id.*

3. "Spouse abuse" is used to refer to violence between adults who are intimates regardless of their marital status or living arrangements. Abused persons are referred to as female and batterers as male. It is widely recognized that although some men are beaten by their mates, the vast majority of abused adults are female.

4. *Parnas*, *Prosecutorial and Judicial Handling of Family Violence*, 9 CRIM. LAW BULL. 733 (1973).

5. *Id.* at 759.

6. *Field and Field*, *Marital Violence and the Criminal Process: Neither Justice nor Peace*, 42 SOCIAL SERVICE REVIEW 221, 227 (1973).

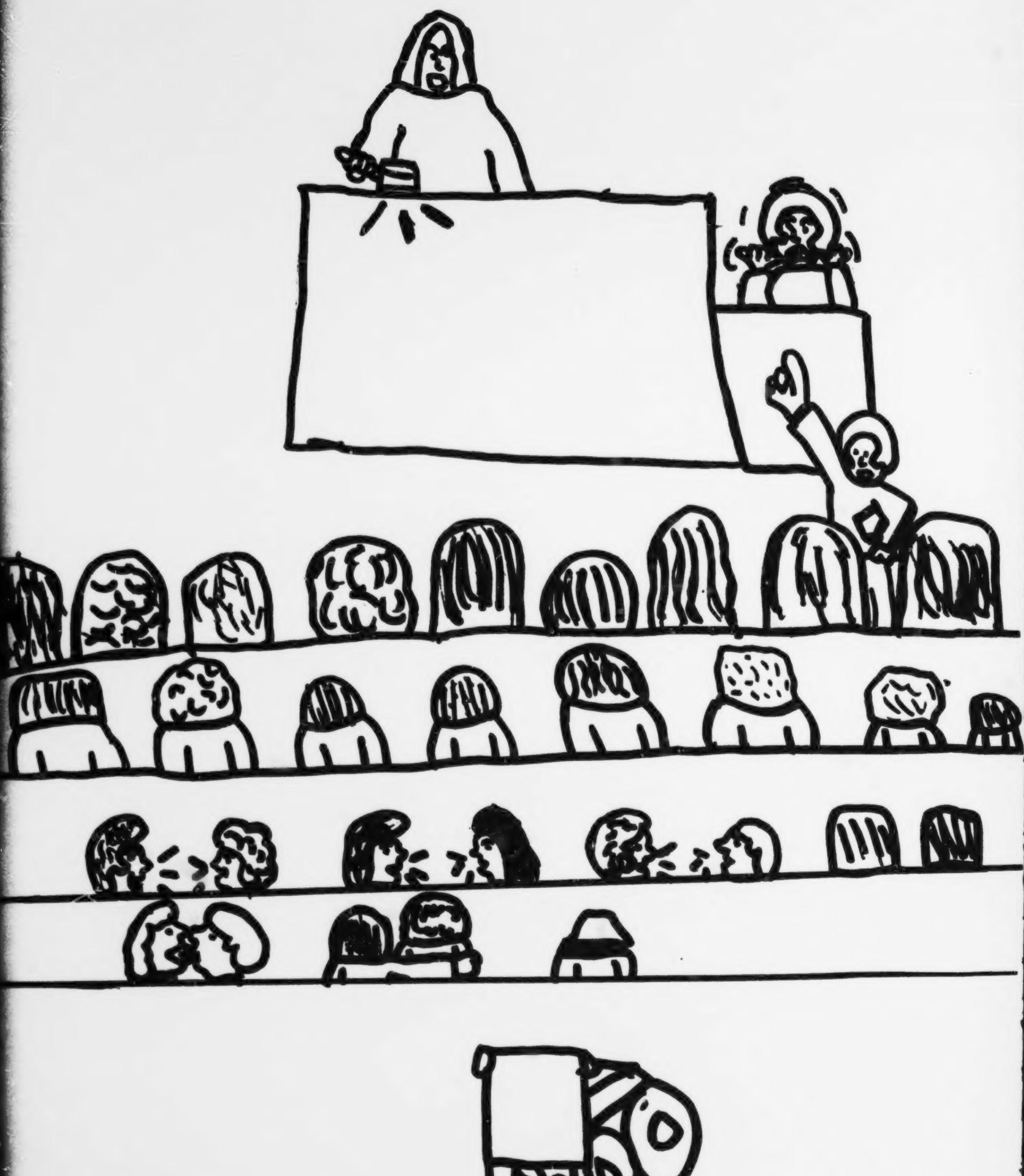
7. *Id.*

8. *Eisenberg and Micklow*, *The Assaulted Wife: Catch-22 Revisited*, 3 WOMEN'S RIGHTS LAW RPTR. 138, 160 (1977).

9. *Id.* at 161.

10. Fields, *Wife Beating: Government Intervention Policies and Practices*, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 228, 252 (1978) (ed. United States Commission on Civil Rights).

11. T. FROMSON, PROSECUTOR'S RESPONSIBILITY IN SPOUSE ABUSE CASES (1980) (on file at the Center for Women Policy Studies).



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There are a variety of obstacles which must be overcome in order to successfully prosecute spouse abuse cases, including attitudinal, practical, and institutional problems. At present, most criminal justice agencies communicate to victims and batterers that family violence is not a serious crime. Many prosecutors believe that even the most serious cases are impossible to prosecute because victims request that charges be dropped before dispositions are reached. Obstacles to prosecution are discussed in Chapter One.

Reducing case attrition and improving the rate of victim cooperation is the topic of Chapter Two. By examining various programs which have been established in prosecutors' offices, one discovers that victim cooperation is better predicted by the conduct of the prosecutor than by the conduct of either the victim or the defendant. Procedures and policies are discussed which encourage battered women to file charges in appropriate cases and to cooperate with prosecution once charges are initiated. All of the techniques suggested balance the battered woman's goals and the need for cooperation against the promotion of equal enforcement of the law in stranger and nonstranger cases.

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CHAPTER ONE

OBSTACLES TO SUCCESSFUL PROSECUTION

Many prosecutors believe that family violence is better handled by social service agencies or domestic relations courts than by criminal courts. They believe that most domestic cases are trivial crimes, and that the more serious cases are impossible to prosecute. From the prosecutor's perspective, the primary problem with prosecution of spouse abuse is that it is time wasted, since most victims request that charges be dropped before dispositions are reached. Given the enormous caseloads of most prosecutors, the result is that domestic violence cases are assigned lower priority than robbery, arson, and other crimes between strangers.

Victims of abuse request that charges be dropped for a variety of reasons, ranging from fear of reprisal if charges are pursued to mistrust of or lack of information about the criminal justice system. In some cases, requests for dismissal are based on the victim's emotional attachment to the abuser, in others simply to the time which would be lost from work by participating as a complaining witness.

WHY PROSECUTE?

There are, nevertheless, reasons why prosecution may be the most appropriate course in domestic abuse cases. First, the failure of the criminal justice system to enforce the law against abusers contributes to the perpetuation of violence within families. It is well-established that spouse abuse is epidemic in the United States, pervading every race and ethnic group, every economic class, every geographic area.[1] Battering can no longer be regarded as merely an "individual" problem or a "relationship" problem but must be viewed as perpetuated, at least in part, by inadequate or inappropriate responses by the institutions from which violent families seek help.[2]

Police who refuse to make an arrest because injuries are not visible and prosecutors who refuse to file charges because they believe victims will not testify communicate to victims and batterers that family violence is not a serious crime. This gives batterers tacit permission to continue their violent behavior. Efforts to improve prosecutorial policy on family violence may help to reverse those messages.

Second, some prosecutors have made changes in policy and procedure which demonstrate that the criminal courts can protect victims of abuse and can require batterers to change their behavior. Criminal justice officials have the power to take people into custody, to deprive them of property, and to require or prohibit certain behavior. Also, an arrest, a criminal charge, or a conviction may have enormous symbolic impact, because of the stigma attached to criminal misconduct.

Third, if family violence becomes a priority for prosecutors, police response to battered women may be greatly improved. Since the police are usually the first to be called for help, their action is critical. Police are often reluctant to make arrests or to file reports in domestic cases, in part because they believe that the offender will not be charged. If more batterers are prosecuted, police may be encouraged to make arrests where appropriate, and to provide victims with protection or referrals which may prevent subsequent violence.

Finally, unless prosecutors change their policies to take a more active role in protecting battered women, they may be subject to civil liability for denial of equal protection to battered women or for the wrongful death of battered women who have sought assistance from prosecutors and have been refused help. While most of the relevant case law holds that a prosecutor cannot be sued for failure to prosecute because that decision is wholly within the discretion of the prosecutor, prosecutors may be vulnerable to liability for violation of constitutional rights, violation of a statutory duty, or for arbitrary, capricious, or abusive conduct.[3]

A more detailed examination of the major obstacles to effective prosecution of spouse abuse will provide a framework for understanding why the various innovations have been so effective.

TRADITIONAL VIEWS OF THE FAMILY

In the early nineteenth century, a man in the United States was legally permitted to chastise his wife "without subjecting himself to vexatious prosecutions for assault and battery, resulting in the mutual discredit and shame of all parties concerned."[4] This rule was taken from English common law, under which the husband and wife were treated as one person (the husband) and under which the disciplinary authority of a man over members of the household was unquestioned.[5]

During the latter part of the century there was widespread protest against family violence by suffragists and others, and wifebeating was declared illegal by courts and legislators around the country. By 1870, wifebeating was illegal in most states.[6] However, few batterers were prosecuted, and no concerted effort to enforce criminal laws against batterers was made until the 1970's,[7] a hundred years later.

Many of the historical reasons for nonintervention by criminal justice officials in family violence cases still influence current prosecutorial policy. Many prosecutors believe that spouse abuse is not serious or widespread and view cases involving family members or intimates as "minor disputes" or "disturbances." Most prosecutors avoid filing charges in family violence cases whenever possible.[8]

Throughout the legal system, the family is treated as a sacred entity; as a stable social unit which must be preserved or at least left undisturbed.[9] Viewed through this preconception, violence within families is minimized and treated as a minor disruption, a normal part of life.

Frank Miller, a former prosecutor, argues that "if prosecution were to be commenced in every case in which a drunken husband struck his wife, ...the charging decision would place an additional strain on an inevitably continuing relationship."[10] Some commentators, who view family violence as caused by poverty or psychological problems, believe that criminal action will worsen the economic plight of the parties, or at best will be an irrelevant remedy for a basically interpersonal problem.[11]

Some prosecutors are disinclined to prosecute batterers because they believe that the violence is usually provoked by the victims. In explaining the minimal number of charges filed for spouse assault, one author states that "in some cases the detective may determine that the infraction was minor and that both parties were equally guilty.... this normally is the result when a husband has assaulted his wife but the injury is not serious and it appears that there was "good cause" for him to do so.[12] This assumption that the victim probably provoked her abuser parallels outdated psychological literature in which women victims of domestic violence are characterized as masochistic.[13]

For centuries prosecutors have assumed that domestic abuse is a minor problem, that for a man to strike his wife is a legitimate exercise of his authority to discipline her, that women provoke the beatings they receive, or that they enjoy them. The vitality of this tradition is one barrier to effective criminal intervention in violent families.

CASE ATTRITION AND OTHER PROBLEMS

Traditional attitudes toward crime and family life that lead prosecutors to regard spouse abuse as outside of their jurisdiction are reinforced by negative experience in prosecuting spouse abuse cases. The prosecutor views a case from the point of view of its legal viability, and is concerned with the availability of the complainant, other witnesses, and tangible evidence of the crime. In spouse abuse cases, witnesses and evidence are often less available than in stranger-to-stranger cases because police rarely make arrests, file reports, or thoroughly investigate spouse abuse cases.

The biggest problem reported by prosecutors is that victims of abuse who initially express interest in filing charges change their minds by the time of the arraignment or the preliminary hearing. A study of post-arrest procedure in the District of Columbia found that witness problems accounted for dismissal of 43 percent of the cases involving family members and 17 percent of the cases involving strangers.[14] In examining reasons for dismissal of felony cases, the Vera Institute of Justice found that of the cases dismissed, victim noncooperation was the stated cause of dismissal in 92 percent of the prior relationship cases.[15] Several prosecutors interviewed for the CWPS study reported that approximately 80 percent of domestic cases in which charges are filed are dismissed prior to disposition.[16] They all reported that cases were dropped because the victim requested dismissal or else failed to appear for a meeting with the prosecutor or for a court hearing.

Victims of abuse drop charges or fail to show up in court for a variety of reasons, including ignorance about the justice system, fear of, or emotional attachment to the abuser, and inconvenience. Frank Cannavale, an expert on crime victims, found that 28 percent of 922 witnesses surveyed expressed fear of retaliation by the defendant if they pursued criminal action.

He noted that "[w]itnesses in cases involving defendants known to them indicated more fear of reprisal than when the defendant was a stranger."[17] Nancy Seih, an assistant district attorney in Santa Barbara, California, observed that half of the victims of abuse who came to her office to drop charges were accompanied by their abusers, who had threatened them with further abuse unless they dropped charges.[18]

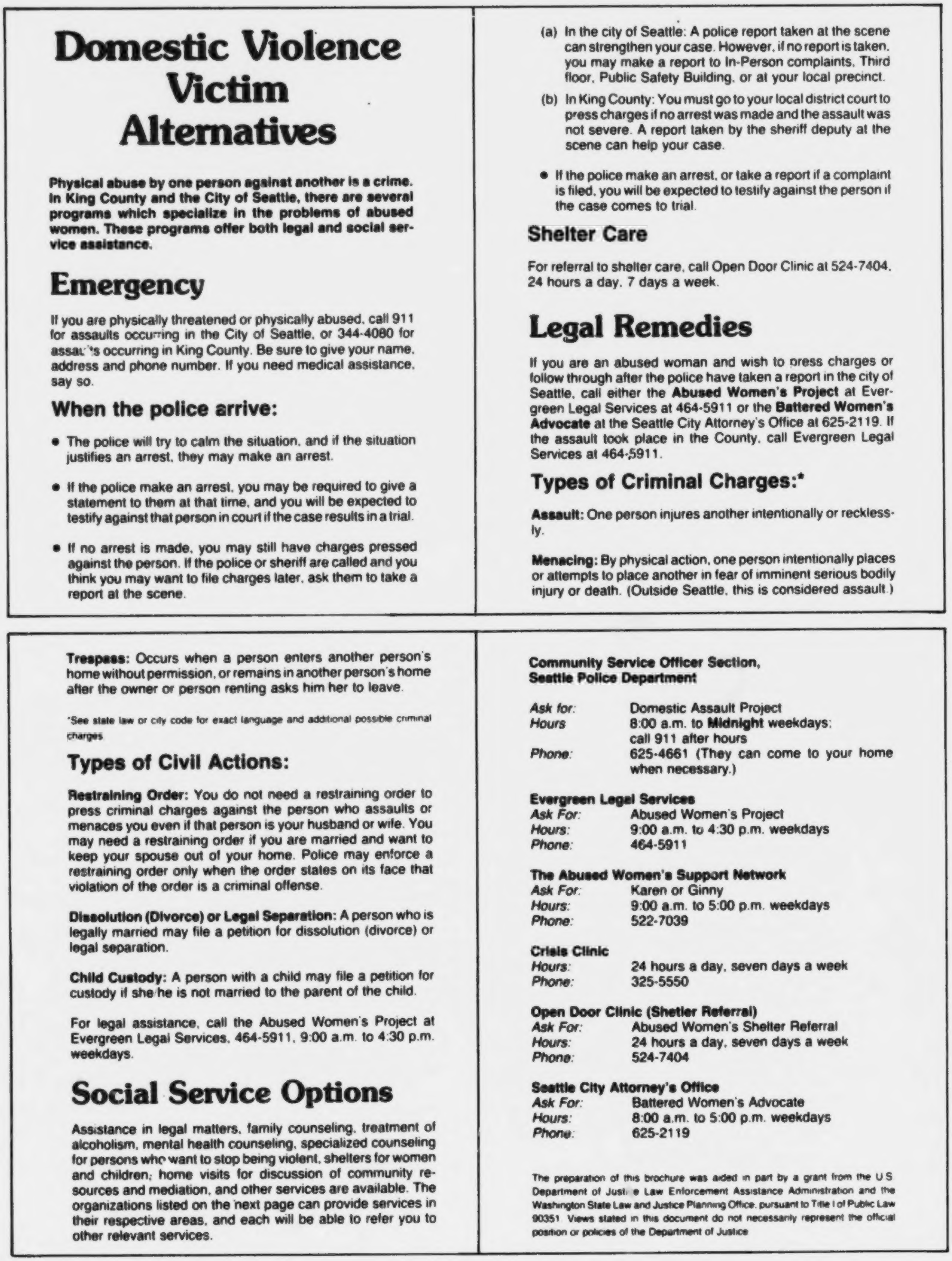
Many victims drop charges because they do not understand the criminal justice system, and receive little or no information about the steps in the process or the likely consequences of criminal action from either the prosecutor or the court.[19] Many victims think that every criminal case goes to trial, that they will be required to testify and subjected to rigorous interrogation on the stand, and that if the abuser is convicted he will be given a lengthy jail sentence.

Prosecutors are in no position to give battered women the attention and the information they need because they are under tremendous caseload pressure and are trained to focus their attention on proving the case, and not on the victim's needs. The National District Attorneys Association established a victim/witness assistance program because they concluded that "prosecutors are ill-equipped to handle, and have little information on, the very real problems of victims and witnesses with whom they must deal."[20]

Prosecutors often suggest that the only reason victims drop charges is that the victim and the abuser have reconciled, that once "passions have cooled" the impulse to retaliate disappears, and the relationship returns to "normal." Reconciliation undoubtedly accounts for some withdrawal of charges by victims of abuse. Lenore Walker suggests that after an acute battering incident, there is a period of "loving respite" between the abuser and victim, during which the abuser is genuinely affectionate and apologetic.[21] While many battered women are highly motivated to get help in stopping the violence immediately after an incident, some victims may later accept their mates' apologies and promises never to hit them again and withdraw from prosecution.

Another reason for withdrawal of charges is delay and inconvenience. Cannavale found that 619 out of 922 witnesses reported that their cases had been postponed, and over 50 percent said there had been more than one postponement.[22] Marie Hegarty, a paralegal with Women Against Abuse who works in the Philadelphia District Attorney's Office, believes that the primary reasons why victims of abuse drop charges are that too much time would be lost from work or that child care would have to be arranged for too many court appearances.[23] When a case takes months to process, the victim may lose confidence that the system has anything to offer her. She comes to court because of immediate danger and trauma, and needs immediate protection.

Another reason for case attrition in nonstranger cases is that prosecutors anticipate the withdrawal of complaining witnesses who know their assailants, and they discourage women from filing charges or following through with prosecution. Researchers found in one study that victims are less likely



Domestic Violence Victim Alternatives

Physical abuse by one person against another is a crime. In King County and the City of Seattle, there are several programs which specialize in the problems of abused women. These programs offer both legal and social service assistance.

Emergency

If you are physically threatened or physically abused, call 911 for assaults occurring in the City of Seattle, or 344-4080 for assaults occurring in King County. Be sure to give your name, address and phone number. If you need medical assistance, say so.

When the police arrive:

- The police will try to calm the situation, and if the situation justifies an arrest, they may make an arrest.
- If the police make an arrest, you may be required to give a statement to them at that time, and you will be expected to testify against that person in court if the case results in a trial.
- If no arrest is made, you may still have charges pressed against the person. If the police or sheriff are called and you think you may want to file charges later, ask them to take a report at the scene.
  - (a) In the city of Seattle: A police report taken at the scene can strengthen your case. However, if no report is taken, you may make a report to In-Person complaints, Third floor, Public Safety Building, or at your local precinct.
  - (b) In King County: You must go to your local district court to press charges if no arrest was made and the assault was not severe. A report taken by the sheriff deputy at the scene can help your case.
- If the police make an arrest, or take a report if a complaint is filed, you will be expected to testify against the person if the case comes to trial.

Shelter Care

For referral to shelter care, call Open Door Clinic at 524-7404, 24 hours a day, 7 days a week.

Legal Remedies

If you are an abused woman and wish to press charges or follow through after the police have taken a report in the city of Seattle, call either the **Abused Women's Project** at Evergreen Legal Services at 464-5911 or the **Battered Women's Advocate** at the Seattle City Attorney's Office at 625-2119. If the assault took place in the County, call Evergreen Legal Services at 464-5911.

Types of Criminal Charges:*

Assault: One person injures another intentionally or recklessly.

Menacing: By physical action, one person intentionally places or attempts to place another in fear of imminent serious bodily injury or death. (Outside Seattle, this is considered assault.)

Trespass: Occurs when a person enters another person's home without permission, or remains in another person's home after the owner or person renting asks him her to leave.

*See state law or city code for exact language and additional possible criminal charges.

Types of Civil Actions:

Restraining Order: You do not need a restraining order to press criminal charges against the person who assaults or menaces you even if that person is your husband or wife. You may need a restraining order if you are married and want to keep your spouse out of your home. Police may enforce a restraining order only when the order states on its face that violation of the order is a criminal offense.

Dissolution (Divorce) or Legal Separation: A person who is legally married may file a petition for dissolution (divorce) or legal separation.

Child Custody: A person with a child may file a petition for custody if she/he is not married to the parent of the child.

For legal assistance, call the Abused Women's Project at Evergreen Legal Services, 464-5911, 9:00 a.m. to 4:30 p.m. weekdays.

Social Service Options

Assistance in legal matters, family counseling, treatment of alcoholism, mental health counseling, specialized counseling for persons who want to stop being violent, shelters for women and children; home visits for discussion of community resources and mediation, and other services are available. The organizations listed on the next page can provide services in their respective areas, and each will be able to refer you to other relevant services.

Community Service Officer Section,
Seattle Police Department

Ask for: Domestic Assault Project
Hours 8:00 a.m. to **Midnight** weekdays; call 911 after hours
Phone: 625-4661 (They can come to your home when necessary.)

Evergreen Legal Services
Ask For: Abused Women's Project
Hours: 9:00 a.m. to 4:30 p.m. weekdays
Phone: 464-5911

The Abused Women's Support Network
Ask For: Karen or Ginny
Hours: 9:00 a.m. to 5:00 p.m. weekdays
Phone: 522-7039

Crisis Clinic
Hours: 24 hours a day, seven days a week
Phone: 325-5550

Open Door Clinic (Shelter Referral)
Ask For: Abused Women's Shelter Referral
Hours: 24 hours a day, seven days a week
Phone: 524-7404

Seattle City Attorney's Office
Ask For: Battered Women's Advocate
Hours: 8:00 a.m. to 5:00 p.m. weekdays
Phone: 625-2119

The preparation of this brochure was aided in part by a grant from the U.S. Department of Justice Law Enforcement Assistance Administration and the Washington State Law and Justice Planning Office, pursuant to Title I of Public Law 90351. Views stated in this document do not necessarily represent the official position or policies of the Department of Justice.

VICTIM INFORMATION LEAFLET

The Seattle police give this brochure to battered women when they respond to domestic calls.

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to cooperate in prosecution if the prosecutor believes that they will not cooperate.[24]

Family violence cases are difficult to prosecute. Often there are no witnesses except perhaps the children of the parties. There may be little or no evidence of the crime charged, because the victim did not get immediate medical attention, because no one took photos of the injuries, and because bruises may have disappeared by the time the victim goes to court. Police reports are often inadequate or nonexistent. These factors increase prosecutors' reluctance to press charges, and reduce the likelihood of conviction in cases which are brought to trial.

Most prosecutors rarely have an opportunity to take a domestic violence case to trial. Those who do report present yet another layer of practical problems. The batterer may appear in court looking respectable, confident, and collected. He may deny the occurrence of the alleged incident and urge that the victim was injured because she was drunk or took too many tranquilizers and fell down the stairs or ran into a door.

He may claim that at the time of the alleged assault the victim became hysterical or violent and had to be restrained through the use of force. Some batterers claim that the assaults with which they were charged occurred accidentally. In one case a man took the stand and explained that his mate received two black eyes one day when he was stretching and she ran into his extended fists.

Where the proof of guilt turns on the credibility of witnesses, this pattern of denial can pose a substantial problem for the prosecution. The problem may be more acute if the victim takes the stand and is so frightened that she becomes unable to speak or to give coherent testimony.

A third set of obstacles to prosecution of spouse abuse cases relates to fiscal and practical constraints on the court system and the prosecutor's office to keep the caseload down, and to focus on crimes designated as priorities. In part because of their numbers, and in part because of the attitudinal problems discussed earlier, family violence cases are usually rated as the lowest priority. This perspective is articulated in a report on felony prosecution in New York:

> Judges and prosecutors recognized that in many cases conviction and prison sentences are inappropriate responses. Because our society has not found adequate alternatives to arrest and adjudication for coping with interpersonal anger publicly expressed, we pay a price.... The congestion and drain on resources caused by an excessive number of such cases in the courts weakens the ability of the criminal justice system to deal quickly and decisively with "real" felons.[25]

Another commentator remarks that "if charging occurred in all of these cases, officials believe that an inordinate amount of resources would be expended in attempting to control infractions of a relatively minor nature."[26]

The caseload in most prosecutor's offices is overwhelming, and does not permit staff to spend extra time with reluctant victims in order to encourage cooperation with prosecutors. Priorities may be set based not on the seriousness of the crime charged or the likelihood of recurrence if no action is taken, but on the likelihood of conviction and potential benefit to the prosecutor's career.

The preceding discussion of obstacles to prosecution of family violence shows that the cases are not intrinsically impossible to prosecute successfully but rather that success is unlikely because of a wide array of attitudinal, practical, and institutional problems.

RESEARCH ON CASE PROCESSING

Recent studies show that at each stage of case processing in the criminal justice system, the number of domestic abuse cases drops dramatically.

In most cases the first criminal justice agency that a battered woman contacts is a police department. Though family abuse cases comprise a substantial percentage of police work,[27] research indicates that police responding to domestic calls rarely file reports on incidents of spouse abuse, and even more rarely make arrests. A survey of spousal violence against women in Kentucky conducted in 1979 by Louis Harris and Associates reports that ten percent of the women interviewed had experienced some violence from their husbands during the preceding twelve months. The police had been called in less than one tenth of these cases.[28] Of 155 police officers interviewed for a study in San Diego County, 83 percent stated that they filed reports for fewer than 20 percent of the domestic calls they answered.[29] In Cleveland, Ohio, during a nine-month period in 1979, the police received approximately 15,000 domestic violence calls. Reports were filed on 700 of these calls, and arrests were made in 460 cases.[30] These figures may reflect a higher than average rate of arrests and reporting because Ohio has new legislation allowing police to make warrantless arrests in misdemeanor domestic abuse cases.

Many times abusers are not arrested even where the violence is so serious that a homicide may be imminent. In analyzing homicides against family members in Kansas City in 1977, the Police Foundation found that in 85 percent of the cases, the police had been summoned to the residence at least once before, and in 50 percent of the cases the police had been called to the home of the victim five or more times before the killing.[31] In a recent case, a Washington, D.C. woman was acquitted of murder charges based on a self-defense argument. The defense introduced evidence that the police dispatcher had recorded 13 calls to the residence in the 9 months before the homicide; several of the responding officers testified for the defense.[32]

Several recent studies have examined factors that determine when police will make arrests. Police often impose a higher standard of probable cause to arrest in spouse abuse cases than on stranger cases. Injuries which would be grounds for arrest of a stranger assailant are often found insufficient to justify arresting a man who beats his wife or girlfriend. Examining cases in which the New York City police made felony assault arrests, the Vera Institute of Justice found that there was a smaller percentage of arrests based on minor injuries ("injury requiring some medical attention, stitches, or hospitalization") in cases where the parties had a prior relationship than where the parties were strangers. Serious injury was present in 46 percent of the cases in which an arrest was made and the parties had some prior relationship, but in only 33 percent of the stranger cases.[33] Given that police report that most domestic cases involve injuries not serious enough to justify making an arrest, this finding suggests that police required more serious injuries to justify arrest in nonstranger cases.

In a recent study by the Police Executive Research Forum, 130 police officers in 17 police agencies in various parts of the country ranked in order of importance a list of factors that might lead them not to make an arrest. Factors listed as most important are listed below, with the percentage of officers who identified each factor as important in a decision not to arrest.

- Refusal of victim to press charges (92%)
- Victims' tendency to drop charges (72%)
- Lack of serious injury (70%)
- Availability of effective social service and civil alternatives (65%)
- Commission of a misdemeanor (56%)
- Participant's first encounter with the police (50%)
- Frequent calls from household for police assistance (49%)
- No use of a weapon (48%)[34]

In a cross-city comparison of felony case processing, the Institute for Law and Social Research (INSLAW) reported that only a few of the cases reported to the prosecutor by police officers and private citizens resulted in filing of charges. Where the parties to an assault case were married or intimate, prosecutors were less likely to file charges than where the parties were strangers.[35]

Many of the domestic violence cases that reach the prosecutors' office have been screened by the police and judged to be serious. Even so, most family violence cases handled by prosecutor's offices are rejected before charges are filed or dropped prior to trial.

In the District of Columbia in 1972, according to Kristen Williams of INSLAW, assault cases "had the highest rates of attrition at screening and subsequent stages of processing." Seventy-five percent of these cases involved family members, friends, or acquaintances. Prosecutors declined to file charges in 39 percent of the simple assault cases in which an arrest had been made and in 30 percent of the arrests for felony assault.[36] The INSLAW study also reports that of the assault cases in which an arrest was made, 45 percent of those charged were dismissed by the prosecutor.[37]

The percentage of convictions in intrafamily cases which are prosecuted to disposition is, again, disproportionately low compared to the rate of conviction for assault charges in cases in which the parties are strangers. According to Brian Forst at INSLAW, "Conviction rates in stranger-to-stranger violent offenses other than robbery in the District of Columbia are, on the whole, nearly twice as large as they are in the intrafamily violent episodes."[38] In 1974, in the District of Columbia, 31 percent of arrests for aggravated assault involving strangers resulted in conviction, but only 18 percent of the arrests for aggravated assault resulted in conviction in intrafamily cases. Of arrests made for simple assault, 31 percent of the stranger cases and 8 percent of the intrafamily cases resulted in conviction.[39]

The 1977 Vera study of felony prosecution in New York produced a similar finding. Of the felony arrests in the sample, convictions (on any charge) were obtained in 71 percent of the cases involving strangers, but in only 46 percent of the cases in which the parties had some prior relationship.[40] The rate of conviction for prior relationship cases was higher in the Vera study than in the INSLAW study. (This could reflect the inclusion in the Vera study of not only family members but friends and acquaintances; it might also be related to the much smaller sample in the Vera study.)

Where convictions are obtained in family violence cases, the penalties imposed are lighter than those imposed in stranger cases. The Vera study states that of the felony assault arrests included in the sample, 5 percent of those involving strangers resulted in sentences of over one year in jail. None of those involving parties with a prior relationship received jail sentences of over one year.[41]

The studies just discussed were conducted in several cities, examined different criminal justice agencies, and used different research techniques. While none had as a primary goal the gathering of information on domestic violence, each nevertheless found that cases involving nonstrangers or family members are dropped from the criminal justice system at a much higher rate than stranger cases. This pattern suggests that in most places prosecution is seldom an available remedy for battered women.

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1. Straus, *Wife Beating: How Common and Why?* 2 VICTIMOLOGY 443 (1977-1978); *see* M. SCHULMAN, A SURVEY OF SPOUSAL VIOLENCE AGAINST WOMEN IN KENTUCKY (1979) (on file at the Center for Women Policy Studies).

2. One poignant example of the role of institutions in perpetuating family violence is that of hospitals that routinely distribute sedatives to women who complain of abuse. The sedation makes it less likely that the victim will take any action to protect herself from subsequent abuse. *See* E. STARK, A. FLITCRAFT, *et al.*, WIFE ABUSE IN THE MEDICAL SETTING: AN INTRODUCTION FOR HEALTH PERSONNEL (1981) (on file at the Center for Women Policy Studies).

3. Blum, *Draft Memorandum on Prosecutorial Discretion* (1980) (available from the National Center on Women and Family Law). Prosecutors have been sued by battered women several times.

   In October 1980, for example, a lawsuit was filed against prosecutors and police in Texas on behalf of the surviving children of two battered women who were killed by their husbands. The complaint, based on the Texas Wrongful Dealth Act and on 42 U.S.C. § 1983, alleged that the women's deaths were proximately caused by the failure of police and prosecutors to take action on repeated requests for assistance. One decendent had presented a prosecutor with photographs of injuries she had suffered as a result of her husband's beatings, and the prosecutor had refused to take action. The other decendent had presented the prosecutor with a written death threat she had received in the mail, and he advised her that the DA's office could or would do nothing. She was killed by her husband the next day. Plaintiffs Original Petition, *Miller v. Curry*, No. 17-62842-80 (Dist. Ct., Tarraut County Tax, filed September 15, 1980).

   The trial judge dismissed the complaint on grounds of prosecutorial immunity; the case is now on appeal. Telephone interview with Pat Clark, attorney for Plaintiffs, (August 19, 1981).

4. Eisenberg and Micklow, *The Assaulted Wife: Catch-22 Revisited*, 3 WOMEN'S RIGHTS LAW REPORTER 138 (1977); *Bradley v. State*, 2 Miss. 156, 158 (1 Walker 1824).

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5. *Id.*; *see* R. DOBASH and R. DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 48-62 (1979).
6. Pleck, *Wife Beating in Nineteenth Century America*, 4 VICTIMOLOGY 60, 71 (1979).

7. *Id.*

8. *E.g.*, F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH CRIME 267 (1969).

9. DOBASH, *supra* note 5, at 7.

10. MILLER, *supra* note 8, at 267.

11. H. SUBIN, CRIMINAL JUSTICE IN THE METROPOLITAN COURT 56-57 (1973).

12. MILLER, *supra* note 8, at 269.

13. *E.g.*, Snell, et al., *The Wifebeater's Wife: A Study of Family Interaction*, 11 ARCHIVES OF GENERAL PSYCHIATRY 107 (1964).

14. B. FORST, *et al.*, WHAT HAPPENS AFTER ARREST? 28 (1977) (available from the Institute for Law and Social Research).

15. VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS 31 (1977). *See* Field and Field, *Marital Violence and the Criminal Process: Neither Justice Nor Peace*, 42 SOCIAL SERVICE REVIEW 2 (1973).

16. Prosecutors in Philadelphia, Pennsylvania; Marin County, California; and Jacksonville, Florida report that approximately 80 percent of the criminal charges filed in domestic cases are dismissed prior to disposition because the victim requested dismissal or failed to appear for a court hearing or a meeting with the prosecutor. These figures should be viewed with caution since they are estimates made in offices which do not keep data on case attrition. They may be a clearer reflection of the prosecutors' attitudes than of the actual rate of case attrition.

17. F. CANNAVALE, JR., WITNESS COOPERATION 52 (1976).

18. N. Sieh, *Family Violence: The Prosecutor's Challenge* (unpublished paper on file at the Center for Women Policy Studies).

19. CANNAVALE, *supra* note 17, at 88-89.

20. *Id.* at 16.

21. L. WALKER, THE BATTERED WOMAN 65-70 (1979).

22. CANNAVALE, *supra* note 17, at 51.

23. Interview with Marie Hegarty, paralegal with Women Against Abuse in Philadelphia (Nov. 1, 1979).

24. CANNAVALE, *supra* note 17, at 87-91.

25. VERA INSTITUTE OF JUSTICE, *supra* note 15, at xv; *see* MILLER, *supra* note 8, at 267.

26. Skolnick, *Social Control in the Adversary System*, 11 JOURNAL OF CONFLICT RESOLUTION 52, 57-58 (1967).

27. Parnas, *Police Discretion and Diversion of Incidents of Family Violence*, 36 LAW AND CONTEMPORARY PROBLEMS 539, 540, n. 1 (1971).

28. M. SCHULMAN, A SURVEY OF SPOUSAL VIOLENCE AGAINST WOMEN IN KENTUCKY 13 (1979) (on file at the Center for Women Policy Studies).

29. S. PENNELL, PRELIMINARY EVALUATION: SOCIAL ASSAULT PROJECTS 54 (1980) (available from the Comprehensive Planning Organization, San Diego, CA).

30. OHIO ATTORNEY GENERAL, THE OHIO REPORT ON DOMESTIC VIOLENCE 1979, 71; interview with Grace Kilbane, Director of the Cleveland Witness/Victim Assistance Program, in Cleveland, Ohio (Jan. 15, 1981).

31. M. WILT, et al., DOMESTIC VIOLENCE AND THE POLICE 14 (1977). Calls to the residence may not be entirely contiguous with battering cases because the calls were listed by address and not by the type of incident.

32. Mann, *Spouse Abuse: A Problem that Cries for Answers*; THE WASHINGTON POST C1 (May 13, 1981).

33. VERA INSTITUTE OF JUSTICE, *supra* note 15, at 9 (1977).

34. N. LOVING, RESPONDING TO SPOUSE ABUSE AND WIFE BEATING: A GUIDE FOR POLICE 42 (1980) (available from the Police Executive Research Forum).

35. K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 12 (1979) (available from the Institute for Law and Social Research).

36. K. WILLIAMS, THE ROLE OF THE VICTIM IN THE PROSECUTION OF VIOLENT CRIMES 24 (1978) (available from the Institute for Law and Social Research). These figures are based on exami-

nation of 2686 assault cases brought by police in 1973. _Id_. at 41.

37. _Id_. at 24.

38. FORST, _supra_ note 14, at 26.

39. _Id_. at 27.

40. VERA INSTITUTE OF JUSTICE, _supra_ note 15, at 28. This sample included a total of 67 cases, of which 46 involved parties with prior relationships, and 21 involved strangers.

41. _Id_.

CHAPTER TWO

REDUCING CASE ATTRITION

A primary cause of case attrition in family violence cases is that prosecutors, often unintentionally, discourage victims from following through with prosecution. The complaining witness is often made to feel personally responsible for the prosecution of the case and for whatever penalty is ultimately imposed. She usually does not receive adequate information about the criminal justice system or about how to protect herself while charges are pending.

Most prosecutors discourage battered women from filing charges and freely permit ambivalent victims to back out after charges have been filed because they perceive that domestic violence cases involve only minor disputes which are impossible to prosecute successfully. Because other cases are easier to prosecute and are believed to be more serious, prosecutors try not to waste time on domestic cases. Many prosecutors also take the position that criminal action may jeopardize family relationships, and that the family is a sacred institution to be preserved at all costs.

A handful of prosecutors around the country have made spouse abuse cases a priority and have been aggressively prosecuting cases involving intimates. Urging that too many homicides occur between mates, prosecutors in Seattle, Santa Barbara, Los Angeles, Philadelphia, and Westchester County, New York have examined reasons why battered women frequently drop charges, and have adopted procedures to reduce pressures on the complainant.

Recognizing the victim's ambivalence about prosecution and the pressure on the victim to withdraw, these prosecutors attempt to relieve the complainant of responsibility for filing charges. Domestic violence programs in these prosecutors' offices treat spouse abuse as a crime against the state, and assert that the prosecutor, not the victim, is responsible for enforcing the law. In addition, the prosecutors have examined the reasons why battered women file charges -- looked at what they want from the criminal court -- and have set goals for prosecution that correspond with those of the complainant.

These programs have been effective in reducing case attrition. In 1979 in Santa Barbara, the rate of victim cooperation in cases in which charges were filed was 92 percent.[1] (Victim cooperation means that charges were not dismissed based on the request of the victim or on her refusal to testify.) In Los Angeles, less than 10 percent of the family violence cases charged as misdemeanors are dismissed because of victim noncooperation.[2] In the Philadelphia District Attorney's Office, case attrition in spouse abuse cases was reduced to 20 percent during 1980.[3] In Westchester County, New York, during a six-month period in 1980, only 25 percent of the complaining witnesses in family violence cases withdrew charges prior to disposition.[4] In Seattle, during a two-year period, only 34 percent of the 1116 family violence cases in which charges were filed resulted in acquittals because the victim refused to participate.[5]

These rates are impressive compared with those reported by other prosecutors. For example, in Jacksonville, Florida, the District Attorney's Office estimates that 80 percent of the complainants in spouse abuse cases drop charges prior to disposition.[6] In Marin County, California, before their domestic violence diversion program was established, the rate of case attrition was estimated to be 70 to 80 percent.[7]

Prosecutors interviewed in Miami, Florida and in Cleveland, Ohio were unable to supply data but were hard pressed to think of domestic cases which were not dismissed based on the victim's request.

Witness noncooperation accounts for dismissal of a significant number of criminal cases whether or not the parties are strangers. When the parties know each other, however, the likelihood that the complaining witness will not appear in court is much higher. The Institute of Law and Social Research reports that in the District of Columbia in 1973, prosecutors dismissed 22 percent of the stranger cases and 54 percent of the nonstranger cases because of witness noncooperation.[8] These figures indicate that a case attrition rate of 20 percent may be normal in stranger cases, but is an impressive achievement in family violence cases.

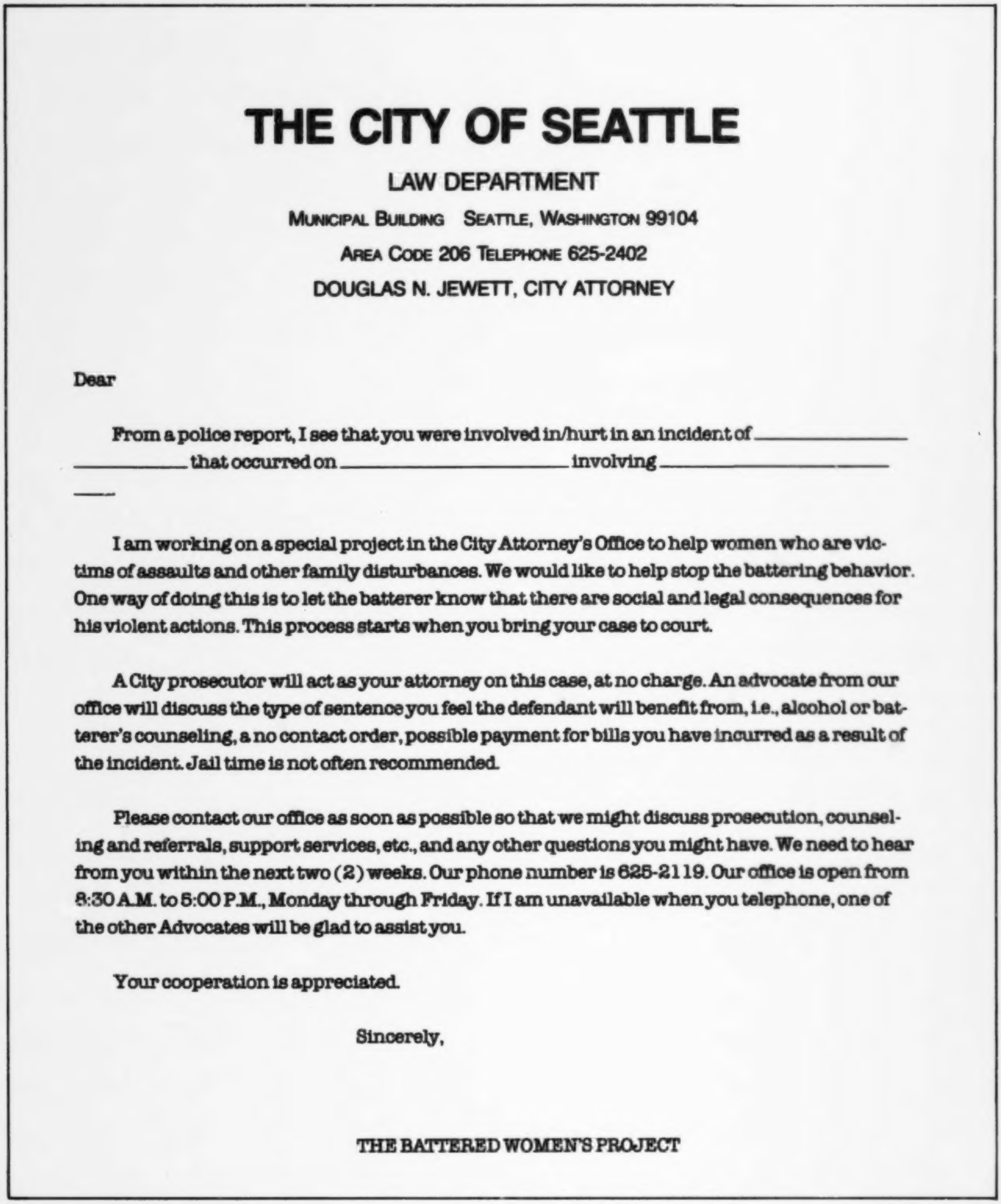
Domestic violence prosecution units have not only reduced case attrition, but have also obtained a high rate of convictions. Notably, the Seattle program reports that 83 percent of the domestic violence cases which go to court result in convictions.[9] In Westchester County, 119 batterers were convicted during the first six months in 1980; only three were acquitted.[10] Although these programs developed independently of each other, they arrived at many similar conclusions about what can be done to encourage victim cooperation in spouse abuses cases.[11]

IDENTIFICATION OF WIFE ABUSE CASES

Prosecutors generally accept as a given the pool of cases which are presented to them for screening, either as a result of arrests, police reports, or victim complaints. However, as the literature reviewed in Chapter I indicated, only a small percentage of the domestic cases in which the police are called to the scene result in either an arrest or a report. In order to have a significant impact on domestic abuse in any community, prosecutors must develop closer communication with police about domestic cases, so that all serious cases may be identified.

To enlarge the pool of domestic violence cases available to be screened for prosecution, prosecutors must solicit reports from police and from victims. One method is to have police report forms designed so that domestic cases can be quickly identified, and then to go through police reports daily and weekly and pull out the domestic violence cases. A second is to supply police with postcards addressed to the prosecutor's office, and ask them to fill in the name and address of the victim every time they answer a disturbance call. A third method is to supply police with brochures describing the assistance available for battered women from the prosecutor's office and elsewhere and to ask that the brochures be distributed to battered women who call the police.

If the prosecutor identifies cases through reports or cards



THE CITY OF SEATTLE

LAW DEPARTMENT

MUNICIPAL BUILDING SEATTLE, WASHINGTON 99104

AREA CODE 206 TELEPHONE 625-2402

DOUGLAS N. JEWETT, CITY ATTORNEY

Dear

From a police report, I see that you were involved in/hurt in an incident of ______________ ______________ that occurred on ______________________ involving ______________________ ___.

I am working on a special project in the City Attorney's Office to help women who are victims of assaults and other family disturbances. We would like to help stop the battering behavior. One way of doing this is to let the batterer know that there are social and legal consequences for his violent actions. This process starts when you bring your case to court.

A City prosecutor will act as your attorney on this case, at no charge. An advocate from our office will discuss the type of sentence you feel the defendant will benefit from, i.e., alcohol or batterer's counseling, a no contact order, possible payment for bills you have incurred as a result of the incident. Jail time is not often recommended.

Please contact our office as soon as possible so that we might discuss prosecution, counseling and referrals, support services, etc., and any other questions you might have. We need to hear from you within the next two (2) weeks. Our phone number is 625-2119. Our office is open from 8:30 A.M. to 5:00 P.M., Monday through Friday. If I am unavailable when you telephone, one of the other Advocates will be glad to assist you.

Your cooperation is appreciated.

Sincerely,

THE BATTERED WOMEN'S PROJECT

VICTIM CONTACT LETTER
In Seattle, police reports are screened and cases that are identified as domestic violence are referred to the Battered Women's Project. The project sends this letter to victims.

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written by the police, victims can then be contacted to make them aware of available services. Regardless of the channel of communication, the goal is to make the cases available to the prosecutor and to make criminal action available to battered women.

All of these methods have been successfully used by programs designed to prosecute domestic violence. Their users report an enormous increase in the number of cases screened, charged, and convicted. Likewise, they report that many of the cases in which no arrest was made are as serious and as appropriate for prosecution as those in which arrests are made.

POLICE REPORTS

In Seattle, Washington, all police reports are screened by prosecutors to determine the appropriateness of prosecution. After the City Attorney set up a Battered Women's Project, the Police Department was persuaded to modify the report form so that domestic violence cases could be identified by a checkmark at the top of the form. Cases thus identified are sent to the Battered Women's Project. Those in which an arrest was made are filed automatically; the project contacts victims in the other cases by phone or letter to determine whether they wish to prosecute.[12] By screening police reports and contacting battered women, the project has more than doubled the number of domestic cases prosecuted by the City Attorney. Since the rate of conviction in those cases which go to court is 83 percent, the increase in the caseload is considered a good service to the community and beneficial to the image of the prosecutor's office.

In Westchester County, New York, police reports are sent to the prosecutor's office only when an arrest is made. The primary channel by which the police inform the Domestic Violence Unit about calls answered is by sending postcards to the unit giving information about how to contact the victims.[13] Then, as in Seattle, victims are contacted by the prosecutor's office and offered services. The unit gets calls from about 30 percent of the victims who are sent letters. According to Jeanine Pirro, the Assistant District Attorney who directs the unit, police response has vastly improved because police "know they have a prosecutor who will back them up to the hilt."[14]

Establishing such a system is no small task. The post card may be simpler to sell than a request for increased reporting, however, because it involves less paperwork. The Westchester Domestic Violence Unit encourages use of postcards during personal visits to each of the forty-three police departments in the county served by the prosecutor's office. These visits, usually made during roll call, are also used to encourage arrests in appropriate cases, and to otherwise inform the police of the prosecutor's interest in family violence.

INFORMATION FROM VICTIMS

The most efficient means by which prosecutors may obtain information about domestic violence cases is through a direct report from the police, as in the systems described above. Where direct reporting cannot be implemented, however, police can refer victims interested in filing charges to the prosecutor's office.

In Philadelphia, for example, the District Attorney sponsored a domestic violence program which has received much publicity. The prosecutor's office assisted in drafting a new police directive on family violence, but the size of the city and the police force precludes systematic screening of reports. However, the domestic violence program supplies police with information cards to give to victims of abuse, and encourages police to pass out the cards and to refer victims to the prosecutor's office. Through this mechanism, the program has served over 4,000 battered women each year, more than almost any program in the country.

POSSIBLE PROBLEMS

Some prosecutors are concerned that sending letters to victims based on police reports might place the victim at risk, because the abuser might open the letter and a violent incident might ensue. However, neither the Westchester nor the Seattle projects have had reports of violence precipitated by contact letters sent to victims. The project staff recognize the risk of the letters, but believe that the likelihood of subsequent violence is greater if no one intervenes than if services are offered.

The obligations of confidentiality which limit communications between mental health agencies or private attorneys and law enforcement officials are not at issue between police and prosecutors. The privacy of the parties is not violated by the sharing of information between one law enforcement agency and another.

Better working relationships between police and prosecutors regarding spouse abuse cases will not only increase prosecution, but also will encourage police to take family violence cases seriously. If practical considerations limit the number of cases which can be prosecuted, then selection should not be based on random self-identification. The prosecutor should screen as many cases as possible and prosecute the most serious.

THE DECISION TO PROSECUTE

Although sufficiency of evidence is a prominent consideration in any filing decision, various other criteria are often used in screening domestic violence cases. Some prosecutors extensively interview battered women about whether they feel any reluctance concerning the filing of charges. Others file charges against a batterer only if the victim has agreed to live apart from him or to file for separation or divorce. Some accept criminal complaints from battered women only where the injury is so severe that it would be unconscionable not to file charges. The use of such criteria limits the number of cases in which charges are filed, but does not help to identify the cases in which victims will cooperate. Improving the rate of victim cooperation depends not on weeding out ambivalent victims, but on setting up a system which will encourage victims to cooperate and will protect their interests.

The recent experience of family violence prosecutors reveals no correlation between any identifiable characteristics of the cases or the victims and the likelihood of cooperation. The probability of victim cooperation is in fact better predicted by the conduct of the prosecutor than by the conduct of either the victim or the defendant.[15]

The domestic violence prosecution programs vary in their position as to whether the decision to file charges should be made by the victim or by the prosecutor. Some prosecutors believe that the victim must not be required to cooperate with the district attorney if, at the outset, she does not wish charges to be filed. Other prosecutors see themselves as advocates for the state, and urge that the charging decision should be made by the prosecutor. They argue that the victim may not know what she wants, or that she may shy away from prosecution because of fear of the batterer or of the criminal justice system. Knowing that without effective intervention the cycle of violence will escalate, they suggest that some cases should be prosecuted even if the victim objects.

Domestic violence units in the district attorney's offices in Santa Barbara, Philadelphia, and Westchester County, New York, file criminal charges only if evidence is sufficient and the victim wishes to participate. Victim advocates (persons who informally represent crime victims) discuss all available options with battered women to assist them in making informed decisions. The unit in the Los Angeles City Attorney's Office, on the other hand, takes the position that the "decision to prosecute a criminal case is the responsibility of a public prosecution agency, not the victim of the offense."[16] The prosecutor's interest in enforcing the law is so strong that victims of abuse are obliged to cooperate.

The filing policy of the City Attorney's Office in Seattle, Washington combines that of Los Angeles with the approaches taken by the other programs. In domestic cases in which the abuser has been arrested, charges are filed automatically. Where no arrest is made and a victim reports an incident to the prosecutor, charges are filed only if the victim elects to participate.[17] Separate statistics kept on the two groups of cases indicate no significant difference either in the rate of case attrition or in the conviction rate. This suggests that victim assistance and the policy against dismissal of charges (the project's other important innovation) are more influential than the screening policy in reducing case attrition.

Prosecutors who keep data on domestic violence cases report that charges are filed in 25 to 40 percent of the cases screened. Though their policies vary on consideration of the victim's wishes, the domestic abuse units in Seattle and in Westchester County both file charges in 39 percent of the cases referred to them, either by police or by battered women. Likewise, the units in Portland, Philadelphia, and Los Angeles report that charges are filed in about one third of the cases referred to them. In Marin County, the percentage of reported domestic violence cases in which charges were filed rose from 14 percent to 25 percent when their domestic violence diversion program began in 1980.

Prosecutors evaluating their screening policies may wish to assess the impact a change in policy may have on their caseloads. The number of family violence cases charged may increase somewhat, but if other relevant changes discussed in this chapter are made, the number of cases dismissed or defendents acquitted may drop dramatically. This means fewer wasted resources and higher conviction rates. If the caseload does become unwieldy, prosecutors may wish to institute a diversion program along the lines discussed in Chapter Five, "Post Charge Diversion."

THE DECISION TO DROP CHARGES: COMPLAINANT COOPERATION

While prosecutors disagree about how much a victim's wishes should influence the decision to file charges, prosecutors who have succeeded in reducing case attrition agree that once a charge is filed, the decision to go forward rests with the prosecutor, not with the victim. By setting a policy that charges will not be dropped at the request of the victim, these prosecutors prevent battered women from repeatedly testing their resolve to go to court. They have developed several techniques to convince battered women that violent behavior is a crime against the state and to encourage them to cooperate with the prosecution.

Complaint Signed by Prosecutor

When the prosecutor signs a complaint, it is the prosecutor's first opportunity to show the victim that she is a witness rather than a plaintiff. Though prosecutors frequently sign complaints in other types of cases, in spouse abuse cases, many prosecutors ask victims to sign complaints as a test of their resolve to follow through with prosecution. Prosecutors in Santa Barbara and Los Angeles suggest that this places unnecessary pressure on the victim.

If the complainant is given control of and responsibility for the filing of a charge, she becomes a target for retaliation or pressure to withdraw by the abuser. If the prosecutor signs the complaint and explains to the victim that it is the state and not she who is filing the charge, she is less vulnerable to intimidation. Debbie Talmadge, a prosecutor in Santa Barbara, instructs the victim that if her mate tries to cajole her or threaten her into dropping the charge, she should tell him that she has no power to do so because she did not file the charge and cannot tell the prosecutor how to do his job. Talmadge reports that this strategy is effective in making the victim more comfortable and reducing the likelihood of recrimination.

Denial of Requests for Dismissal

In keeping with the policy that prosecution is not the responsibility of the victim, prosecutors in Seattle, Los Angeles, and Santa Barbara have instituted a policy of denying complainants' requests for dismissal once charges have been filed. This change in procedure is critical to the reduction of case attrition.

Parallel with policies on filing charges, prosecutors have adopted various approaches in order to implement no-drop policies. The Los Angeles City Attorney takes a hard line on withdrawal of charges, and refuses to drop any case based on the victim's request, unless there are "compelling circumstances."[18] In Seattle, if a victim requests the City Attorney to drop charges, the prosecutor asks her to defer her request and to appear in court on the date set for trial. She is encouraged to focus on the positive feelings toward prosecution which led her to make a complaint in the first place.[19] If she still wants to drop the charge on the date of trial, the prosecutor will then request the judge to dismiss the case.

In Santa Barbara, victims are discouraged but not prohibited from dropping charges. The victim is informed at the outset that once charges are filed she will not be permitted to change her mind; the policy is presented as a rigid one to encourage cooperation. The battered woman is encouraged to call the District Attorney's Office anytime she has doubts about pursuing the charge. Usually the prosecutor is able to persuade her not to withdraw; only in a rare case is dismissal requested.[20]

An objection might be raised that even if the prosecutor wishes to go forward, a judge may defer to a battered woman's request for dismissal. A recent decision by an Ohio Court of Appeals held that a judge may not grant a defendant's motion to dismiss based on the victim's reluctance to go forward. The judge was held to have a duty to grant the plaintiff, the State of Ohio, a hearing on the controversy presented. The court held that the granting of defense counsel's motion to dismiss was not abuse of discretion but a violation of judicial duty, because the judge had no discretion.[21]

Subpoena of Witnesses

A third method of reducing the number of dismissals is to subpoena battered women before trial. This makes it clear that the victim is not the prime mover in the case, but is a witness for the state. It also may shield the victim from pressure from the abuser not to appear in court. If the abuser threatens retaliation if she testifies, she can show him that she is required by law to go to court. Some prosecutors feel that it is inappropriate to subpoena battered women, because if they fail to appear, they may be held in contempt of court. A few instances were identified in which battered women in North Carolina were jailed for refusal to testify. Unless the judge hearing a case is hostile toward battered women, issuance of a subpoena is more likely to prevent intimidation and to encourage a victim to appear than to result in inappropriate punitive measures.

Conviction Without Victim Cooperation

When a victim fails to appear in court to testify, the case is usually considered lost. In Seattle, Washington, however, many domestic violence cases have been successfully prosecuted even when the victim is absent. Between 1978 and 1980, in 45 percent of the domestic cases charged by the Seattle City Attorney, the victim did not appear in court on the date of the trial. Rather than requesting dismissal, the prosecution proceeded without her. In 143 out of 420 (34 percent) cases in which this approach was taken, convictions were obtained, based either on the testimony of a police officer or another eyewitness or on photographs of injuries inflicted.[22] The Philadelphia District Attorney's Office also reports an increasing number of domestic abuse convictions obtained based solely on eyewitness testimony.

MATCHING THE PROSECUTOR'S OBJECTIVES WITH THE VICTIM'S NEEDS

The penalties imposed on the abuser after conviction may have an almost equal impact on the life of the victim. Many

IF YOU NEED HELP
OR
IF YOU WANT TO HELP
A BATTERED PERSON

Contact the **DOMESTIC VIOLENCE UNIT**
Westchester District Attorney's Office

County Courthouse
111 Grove Street
Third Floor
White Plains

CALL
682-2127

RIGHT OF ELECTION

1. You have the Right to choose the court in which your case will be heard. You can go to Family Court or Criminal Court.
2. A Family Court proceeding is a civil proceeding and is for the purpose of attempting to keep the family unit intact. Referrals for counseling are available for this purpose.
3. A proceeding in Criminal Court is for the purpose of prosecution of the offender and can result in a criminal Conviction of the Offender.

VICTIM INFORMATION CARDS
Police in Westchester County distribute these cards to battered women when they answer domestic violence calls.

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domestic violence complainants withdraw charges because they believe that criminal conviction will necessarily result in a jail sentence for the abuser, which they may not want and which may cause the victim to lose her only source of financial support.

In Santa Barbara, most of the women who file criminal charges want assistance from the court in stopping the abuse, but want to continue relationships with their mates. Many victims wish to avoid a courtroom confrontation with their mates. Therefore, the prosecutor tries to plea bargain as many cases as possible, and offers to recommend a sentence of probation with mandatory participation in counseling in exchange for a guilty plea. Talmadge explained that she is not so lenient in cases in which there has been a serious injury. There, she stated, "it would be unconscionable" not to ask for a jail sentence.[23]

The Los Angeles City Attorney's program also aims for results which correspond to the complainant's desires. Attorneys do not request incarceration for a first offender unless the victim has been severely injured. Instead, the guidelines require prosecutors to recommend that the court require "[the defendant's] participation in a court-approved counseling program... as a condition of probation."[24] A jail sentence is sought if the abuser has a prior criminal conviction on a domestic violence charge.

In Seattle, many cases are prosecuted as misdemeanors which, according to staff of the Battered Women's Project, could be classified as felonies. This is because the City Attorney's Office (which handles misdemeanors) has a highly visible advocacy unit for battered women, because the County Attorney is reluctant to prosecute cases which are uncertain to result in conviction, and because police perceive domestic abuse as a misdemeanor offense. So the charges filed and the penalties imposed in domestic cases in Seattle are often lower than those imposed for similar crimes between strangers. The result, however, is that the penalties sought, most often probation and counseling, match the desires which led the victim to seek help from the courts.

Some prosecutors who work with battered women are concerned that a systematic reduction of charges and penalties sought leads to treatment of spouse abuse cases as less serious crimes than assaults between strangers. Failure to request jail sentences for serious abuse may confirm the prejudices of criminal justice officials who treat domestic violence as a trivial matter. They, in turn, may refuse to treat seriously other cases in which stiffer penalties are sought. What happens to domestic violence cases in court then filters back to the police and reinforces their reluctance to make arrests or to take victims' requests for protection seriously.

Prosecutors should take care that, in a zealous effort to promote equal enforcement of the law against those who assault strangers and those who assault family members, victims are not overlooked. The prosecutor must be aware of whether the victim intends to continue her relationship with her abuser and of the reasons why she has come to court. He or she must then balance the complainant's goals and the need for cooperation against the promotion of equal enforcement of the law in stranger and nonstranger cases.

VICTIM/WITNESS ASSISTANCE

Lack of communication between prosecutors and battered women is perhaps the biggest single cause of case attrition in domestic violence cases. Victims of abuse who file charges against their mates are often inadequately informed about the process of prosecuting a charge, about what is expected of them and what they should expect. Prosecutors' offices in Westchester County, New York and in Philadelphia, Seattle, Cleveland, and Santa Barbara have set up victim/witness assistance programs to provide information to and to maintain contact with victims and witnesses of crime. Below are some specific forms of assistance they have offered.

Information About Prosecution

Most people do not understand the criminal justice system. Crime victims need basic information about the functions of criminal courts and prosecutors, the steps in the criminal process between charging and disposition, the amount of time and number of hearings involved, and about the possible results. At each step, the victim needs to be told what has happened and what the next step will be.

An advocate can explain how the court may use the possibility of conviction or jail as leverage to require that the abuser stop his violent behavior, stay away from the victim, or attend counseling, even if it is unlikely a jail sentence will be imposed. The advocate may learn the victim's objectives and in turn communicate them to the prosecutor.

An advocate can inform complainants of the limitations of criminal action, such as likely delays and the possibility of acquittal or an inappropriate sentence. He or she can estimate at the outset the amount of time victims may need to take off from work, and can prepare them if necessary for the experience of telling their stories many times to several prosecutors. Some battered women may be put off by a realistic description of what the criminal justice system offers, and what it demands; those who persist will be better prepared and less disappointed.

Practical Assistance

Victim/witness assistance programs often provide a wide range of practical help to facilitate victim participation in prosecution. Some victims fail to appear in court because they have no money for bus fare to get to the courthouse or to pay a babysitter. An advocate can discover such problems and arrange assistance. Many advocates accompany victims to court to explain the process and to reduce the victim's fear of confronting the defendant.

Battered women filing criminal charges against men they live with are in a precarious position. If the situation is extremely volatile, a victim advocate can contact local shelters to find out if space is available, or advise the victim to move out and stay with friends or family. If the victim does not wish to leave, she might be advised to alert neighbors to the danger and ask them to call the police if they hear loud noises. The victim might visit the local police department to discuss the problem; this may result in quicker police response and increased willingness to provide protection, especially if the department is small.

If the parties do not live together, or if the abuser is ordered out of the house, the victim should be encouraged to change the locks on the doors and to make sure that the windows fasten securely. Any weapons in the house should be removed.

Battered women should be instructed how to respond if the abuser threatens to become violent unless the victim drops charges or agrees to deny in court that she was beaten. The victim should insist that she has no choice but to proceed and to tell the truth in court. Debbie Talmadge in Santa Barbara reports that this tactic may make the abuser more cautious because it removes his power to keep the violence hidden. Also it may increase the likelihood that he will plead guilty.

Some victim/witness assistance programs provide services not directly related to criminal prosecution, such as information about other avenues of legal redress, referrals to shelters or counselors, or advice about how to obtain employment or public benefits. Because battered women often initiate criminal action during crisis, obtaining continued cooperation may depend on the victim's access to other sources of help. This broader assistance is important because the criminal courts are a major intake point for people with a variety of problems. While prosecution may be one step in intervening in a violent relationship, other more direct forms of assistance may be equally useful in preventing subsequent violence.

Protection of the Victim

Prosecutors cannot guarantee that a battered woman will not be assaulted while criminal charges are pending, unless the defendant is held in jail until trial. This is rarely an option.[25] There are, however, measures which can be taken by the prosecutor's office and by the victim to reduce the likelihood of violence.

The prosecutor can request that the abuser's release on bail be conditioned on his staying away from the victim and on his not threatening, assaulting, or otherwise intimidating her.[26] Bail contracts or agreements should be modified to allow revocation if the victim is intimidated.[27] If the court system does not provide for police notification of such orders, a victim advocate can contact the police and request their cooperation in enforcement.

If the victim is threatened or assaulted, prosecutors should request a speedy trial of the pending charges to reduce the likelihood of subsequent intimidation.[28] Also, care should be taken that the victim's address is not released to someone likely to threaten her.

Legislation on victim/witness intimidation, which makes it a crime to interfere with a citizen seeking redress through the criminal justice system (or with any witness to a crime), has been enacted in some states.[29] This legislation, however, is rarely enforced. In 1979, the American Bar Association proposed model legislation making it a felony to attempt to prevent or dissuade any witness from testifying in a trial through the use of force or threatened or attempted force against the witness or a family member of the witness. Under the model statute, any pretrial release is deemed to include a condition that no witness be intimidated.[30] However, absence of such legislation does not preclude prosecution of victim/witness intimidation under existing criminal laws nor is legislation needed to impose conditions on the release of the abuser.

If the judge does not impose conditions on release, complainants may be protected from intimidation by a civil protection order. Protection orders may be used in conjunction with criminal charges since most of the statutes expressly provide that the remedy is nonexclusive. Helen Smith, an Assistant District Attorney in Portland, Oregon reports that no-contact orders are available from criminal court, but they are difficult to enforce. Therefore, she advises complainants in spouse abuse cases to petition also for a protection order.[31]

Many of the new statutes allow a judge to evict an abuser; also they provide detailed procedures for enforcement.[32] In some places, victim advocates assist complainants in filing criminal charges and in filing petitions for protection orders. In Carson City, Nevada, prosecutors are willing to file protection order petitions for battered women. If no one else in the community offers free assistance in preparing petitions, it may be important for staff in the prosecutor's office to assume this function.

VICTIM COMPENSATION

Many battered women who file criminal charges have suffered substantial losses as a result of the abuse. These may include extensive medical bills, attorneys fees, property damage, or time lost from work. Few victims are in a position to seek compensation through a personal injury lawsuit, because of the time and expense. A victim advocate may provide an important service to the victim and buttress her desire to cooperate with the prosecutor by informing her of available victim compensation programs and by helping her to obtain compensation.

Victims of domestic violence are ineligible for compensation under most of the twenty-nine state statutes providing for compensation of crime victims.[33] Prosecutors concerned about reducing case attrition should urge expansion of programs created by these statutes to make battered women eligible for compensation. The domestic violence diversion program in Marin County, California requires that abusers pay restitution to victims as a condition of their participation in diversion. The benefits of such programs may be more tangible to a victim than any other consequence of criminal prosecution.

CASE ASSIGNMENT

Prosecutors' offices which handle large numbers of domestic abuse cases should consider assigning at least one full-time advocate to work exclusively on those cases. This would allow for the development of expertise to address the myriad of problems which arise in spouse abuse cases.

Whether or not functions are specialized, staff should provide battered women with information and referrals, maintain contact while charges are pending, facilitate court appearances by arranging transport or child care, and help battered women who become criminal complainants obtain needed protection. Provision of these services in Santa Barbara, Westchester County, and Seattle has reduced greatly the number of domestic assault cases which are dismissed because of victim noncooperation.

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1. Interview with Deborah Talmadge, Assistant District Attorney in Santa Barbara, California, in Santa Barbara (November 4, 1979).

2. Interview with Susan Kaplan, Coordinator of the Domestic Violence Unit in the Los Angeles City Attorney's Office, in Los Angeles (November 8, 1979).

3. Interview with Bebe Holzman Kivitz, Assistant District Attorney in Philadelphia, Pennsylvania, in Vineland, New Jersey (April 21, 1981).

4. See Domestic Violence Unit, Westchester County District Attorney, Statistical Summary, Appendix D.

5. See Battered Women's Project, Seattle City Attorney's Office, Statistical Summary, Appendix C.

6. Response to "Questionnaire on Prosecution of Domestic Violence Cases" [hereinafter cited as "Questionnaire"], submitted by Jay Howell, Assistant District Attorney in Jacksonville, Florida. The questionnaire was developed by the Center for Women Policy Studies and distributed at an NDAA conference in January 1980. Information collected is used only for the purpose of describing respondents' experience with family violence prosecution.

7. Response to "Questionnaire", submitted by Wendy Homer, Coordinator of the Domestic Violence Diversion Program in the Marin County District Attorney's Office, Marin County, California. This questionnaire was submitted before data

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had been collected on cases admitted to the diversion program.

8. K. WILLIAMS, THE ROLE OF THE VICTIM IN THE PROSECUTION OF VIOLENT CRIMES 28 (1978), (available from the Institute for Law and Social Research). Nonstranger crimes are defined in the INSLAW study to include those committed against family members, and friends or acquaintances of the defendant. This may explain why the rate of nonstranger case attrition reported in the study is lower than that reported for family violence cases by prosecutors interviewed.

9. Seattle Statistical Summary, supra note 5, at Table 3. The 83 percent figure is computed by dividing the total number of convictions and guilty pleas in which the victim cooperated by the total number of cases in which the victim cooperated.

10. See Westchester County Statistical Summary, supra note 4.

11. See Prosecutors Discourage Battered Women from Dropping Charges, 3 RESPONSE TO VIOLENCE IN THE FAMILY 1 (December 1979).

12. See Victim Contact Letter, used by Battered Women's Project, Seattle City Attorney, p. 37.

13. See Police Referral Postcard, used by Domestic Violence Unit, Westchester County District Attorney, p. 127.

14. Interview with Jeanine Pirro, Director of the Domestic Violence Unit, Westchester County District Attorney, in White Plains, New York (September 18, 1979).

15. F. CANNAVALE, JR., VICTIM COOPERATION 87-91 (1976).

16. LOS ANGELES CITY ATTORNEY, DOMESTIC VIOLENCE PROGRAM MANUAL 23 (2d ed. 1980).

17. See Seattle Statistical Summary, supra note 5.

18. LOS ANGELES CITY ATTORNEY, supra note 16, at 23. This manual includes the following excerpt from the CRIMINAL BRANCH TRIAL MANUAL:

> Victims do not have the authority to "drop charges"; only the prosecutor can make application to the court for dismissal or seek the court's approval of an amendment to the original complaint for the purpose of a plea to a reduced charge.
>
> Complaints filed in compliance with the Domestic Violence Filing Guidelines shall not be dismissed or reduced in the absence of compelling circumstances and supervisory approval. Persons charged with such crimes will be required to plead to the offense charged or proceed to trial.

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19. Telephone interview with Sally Buckley, Director of the Battered Women's Project of the Seattle City Attorney (September 1980).

20. Interview with Deborah Talmadge, *supra* note 1.

21. *City of Dayton v. Thomas*, 17 Ohio Opinions 3d 255 (1980).

22. *See* Seattle Statistical Summary, *supra* note 5, at Table 3; interview with Judge Barbara Yannick of the Seattle Municipal Court, in Seattle Washington (November 18, 1980).

23. Interview with Deborah Talmadge, *supra* note 1.

24. LOS ANGELES CITY ATTORNEY, *supra* note 16, at 23. This description of forms of assistance which may be provided to domestic violence complainants is drawn largely from observation of victim advocates at work in prosecutors' offices in Seattle, Washington, Westchester County, New York, and Philadelphia, Pennsylvania. For other information on victim/witness assistance, *see* E. VIANO, PH.D., VICTIM/WITNESS SERVICES: A REVIEW OF THE MODEL (1979); BATTELLE MEMORIAL INSTITUTE LAW AND JUSTICE STUDY CENTER, FORCIBLE RAPE: PROSECUTOR ADMINISTRATIVE AND POLICY ISSUES: PROSECUTORS' VOLUME III (1978).

25. *See* Chapter Seven, "Post-Arrest Detention."

26. *See* Chapter Four, "Conditions on Pretrial Release."

27. ABA, REDUCING VICTIM/WITNESS INTIMIDATION 10-12 (1979).

28. *See* Petition for Expedited Prosecution, used by Santa Barbara District Attorney, Appendix K.

29. ABA, *supra* note 27 at 10.

30. *Id*. at 12.

31. Interview with Helen Smith, Assistant District Attorney in Portland, Oregon, in Colorado Springs, Colorado (January 1980).

32. *See State Legislation on Domestic Violence*, 4 RESPONSE TO VIOLENCE IN THE FAMILY (September/October 1981).

33. D. CARROW, CRIME VICTIM COMPENSATION (1980) (available from the National Criminal Justice Reference Service).

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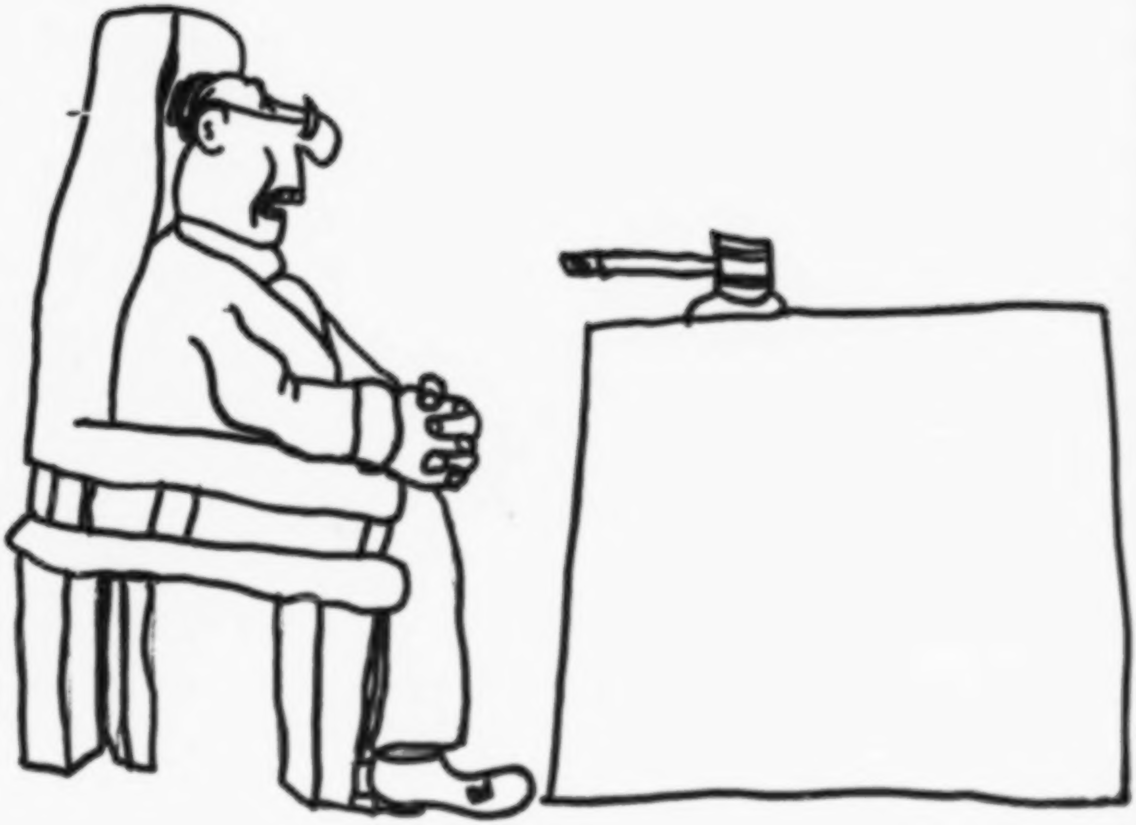
PART II: STOPPING THE VIOLENCE: ALTERNATIVE DISPOSITIONS



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What battered women want most is to have the violence stopped. New procedures by which battering may be punished or deterred may be used at several stages of the criminal process. These include: 1) taking action short of filing charges, 2) imposing conditions on pretrial release, 3) deferring prosecution while the batterer goes through a counseling program, and 4) post-conviction penalties. Many of the sanctions which may be imposed at the various stages are the same. They include orders that the abuser refrain from abuse, attend counseling, that he stay away from the victim or move out of a residence shared with her, or that he pay restitution. However the social stigma and the perceived seriousness of the action taken is greater if the abuser is arrested, detained in jail, or convicted of a crime.

Ironically, the less serious restrictions which occur at earlier stages in the process may be more effective in deterring abuse. Remedies or sanctions which occur within a few days after the precipitating incident are more likely to reduce violence than subsequent action because the violence which led to the charge is still fresh in the batterers' minds; the threat of the power of the court is greatest at that point. Later in the process, after life has resumed virtually undisrupted, batterers are less likely to take court orders seriously. Obtaining a protection order as a condition of pretrial release for example, may take less than a day, while reaching a criminal conviction may take several months or longer. Where long delays are encountered, the likelihood that a disposition will be reached drops sharply, because the complaining witness may drop the charges or the defendant may disappear.

CHAPTER THREE

INFORMAL ACTION SHORT OF FILING CHARGES

Most domestic violence cases screened by prosecutors do not result in the filing of charges,[1] either because available evidence is inadequate to make conviction likely or because the victim does not wish to become a complaining witness. However, some prosecutors' offices, in an effort to prevent subsequent violence, furnish informal assistance to battered women who decide not to file charges. Staff members offer to send warning letters to batterers, provide victims with information about other legal remedies and social services, make referrals to other agencies, and in some cases offer mediation. Given that spousal violence tends to escalate over time, it may be more cost-effective to provide such informal assistance early in the cycle than to prosecute batterers after the violence has become more severe.

The Domestic Violence Unit of the Westchester County District Attorney's Office, under a grant from the LEAA Family Violence Program, developed a model for taking informal action in domestic cases which are screened but not prosecuted. The Neighborhood Justice Centers and the Cleveland Family Violence Program developed models for mediation of spouse abuse cases. A look at these programs indicates what type of prosecutorial action may be most useful in cases in which no charges are filed.

WARNING LETTERS, MEETINGS WITH ABUSERS

For many batterers who have never had any contact with the criminal justice system, who have jobs, and who value their reputations, a threat of prosecution may be an effective deterrent to further abuse. If a prosecutor decides not to file charges, it may be useful to send a letter to the abuser informing him that a complaint has been received, that the alleged conduct is illegal, and that conviction can lead to a jail sentence. The letter might go on to explain that the prosecutor has decided not to file a charge at the time, but that any subsequent complaints will lead to prosecution.[2] The Westchester County District Attorney's Office sends out such letters to over 200 abusers every year. Warning letters are sent at the victim's request if there is reason to believe that there has been a violent incident, but no charge is to be filed. While no systematic follow-up study has been conducted, subsequent violence appears to be rare.[3] While the staff is aware that such letters could precipitate further violence, they report that if the victim is intimately acquainted with the abuser, she is able to predict whether a warning letter will deter or trigger violence.

Jeanine Pirro, Director of the Domestic Violence Unit in Westchester, suggests that the warning letter on the prosecutor's letterhead may be effective because of the authority of the district attorney and the batterer's fear of prosecution. The Abused Women's Project of Evergreen Legal Services in Seattle also sends warning letters to batterers and reports favorable results, even though their letterhead is less official in appearance.

Another informal procedure used in Westchester to deter further violence is to schedule a meeting between a police investigator and a suspected batterer, during which a suspect may be informed of the penalties for criminal assault and of the prosecutor's interest in his subsequent conduct. This procedure should be used with great care to avoid violation of the batterer's constitutional rights. Even if no charges are to be filed, the batterer should be read the Miranda warnings. When he is notified of the meeting, the batterer should be invited to bring his attorney.

REFERRALS

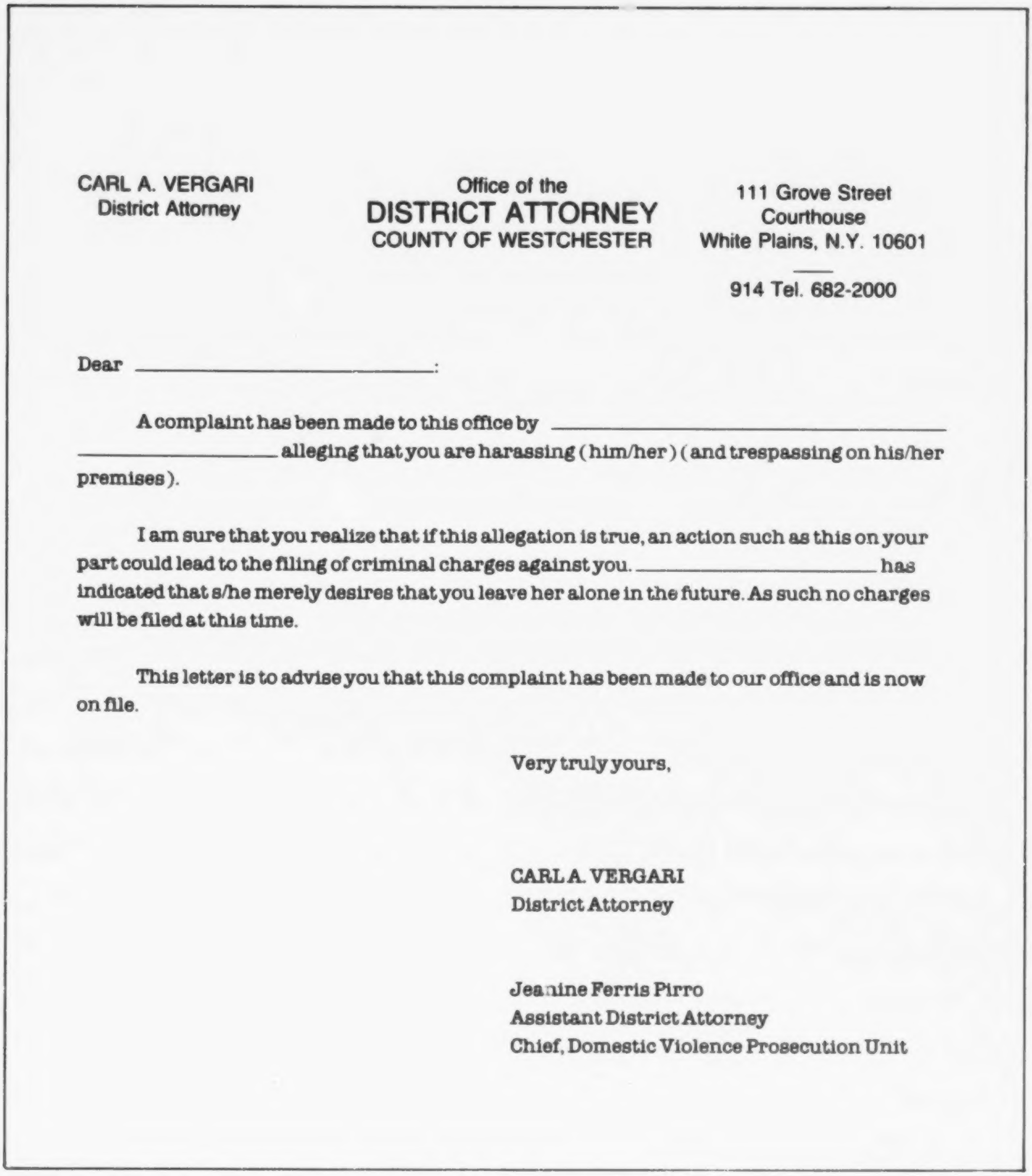
In Westchester County, battered women who appear at a prosecutor's office or call for information are informed of legal remedies and available social services and are given the phone numbers of shelters, hotlines, and legal services offices, regardless of whether a formal complaint is filed. Project staff have found that if a victim decides to file charges, her contact with a shelter or support group may be the key to her continued cooperation. If she does not wish to prosecute, informing her of other services may reduce the likelihood that the case will reappear six months later as a more serious assault or a homicide.

Referrals may be most effective if made during a discussion between a battered woman and a victim advocate, so that the referrals can be tailored to the individual's circumstances. Also, the advocate can call the shelter or the counseling service to see if space is available. If the caseload is too heavy to allow individual services of this nature, the prosecutor may wish to arrange for distribution of a publication containing relevant information. Such referral information may already have been published by shelters or hotlines in the community.

MEDIATION

During the last decade there has been a trend toward reducing court time spent on "minor disputes" by setting up programs to mediate them.[4] Mediation is usually completed in one session, which may last up to six hours; the mediator is most often a trained layperson. During mediation of a domestic dispute, both parties are asked to identify sources of frustration in their relationship and to suggest solutions to the problems they identify. The mediation may produce a written agreement, which lists the changes each party has agreed to make. The agreement may be sealed by the court, but it is generally not enforceable.[5]

Mediation can be useful in limited circumstances in which the violence is not chronic, and in which both parties are motivated to make changes in their relationship. It may be useful in cases where violence has occurred once or twice.



CARL A. VERGARI
District Attorney

Office of the
DISTRICT ATTORNEY
COUNTY OF WESTCHESTER

111 Grove Street
Courthouse
White Plains, N.Y. 10601

914 Tel. 682-2000

Dear ______________________________:

A complaint has been made to this office by ____ ____________________ alleging that you are harassing (him/her) (and trespassing on his/her premises).

I am sure that you realize that if this allegation is true, an action such as this on your part could lead to the filing of criminal charges against you. ________________________ has indicated that s/he merely desires that you leave her alone in the future. As such no charges will be filed at this time.

This letter is to advise you that this complaint has been made to our office and is now on file.

Very truly yours,

CARL A. VERGARI
District Attorney

Jeanine Ferris Pirro
Assistant District Attorney
Chief, Domestic Violence Prosecution Unit

WARNING LETTER
In many domestic violence cases rejected at screening by the Westchester County District Attorney's Office, suspected batterers are sent this letter to warn them that spouse abuse is a crime and that subsequent abuse may lead to filing of criminal charges.

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Once the pattern of abuse is established, more coercive remedies are needed. Because the appropriate uses of domestic violence mediation are so limited, it may not be cost-effective to set up a mediation program. Also, if a program is set up, it is likely that mediation will be used inappropriately in cases where violence is chronic.

If domestic violence cases are to be mediated, the parties should be placed in separate rooms and be allowed to talk privately with the mediator. This will ensure that the victim is not inhibited from expressing her feelings by threats from the abuser.

Those who mediate cases dealing with family violence need extensive training from professionals on conducting mediation. Abusers are often extremely manipulative. Without training, the mediator may not recognize patterns of behavior common to violent men.

Many advocates for battered women argue that mediation is less effective than other available options in reducing violence. They urge that the relegation of domestic violence cases to mediation assumes that the injuries involved are trival. The message communicated to a battered woman when she is denied the right to see a judge is that she has no enforceable right not to be beaten.

The concept of mediation is that two equal parties meet with a neutral third to work out their differences. The balance of power in most violent relationships is heavily weighted toward the batterer and the victim's conduct is circumscribed by threats of force if she fails to please her mate. Generally, both the victim and the abuser blame the victim for the violence, and mediation provides yet another opportunity for the abuser to explain exactly what it is about her behavior that provokes him to beat her. Mediation agreements often include the wife's commitment to have dinner ready on time, to clean the house more thoroughly, or not to nag her mate about his drinking problem. Though the man might agree to try to curb his temper, such a commitment is unlikely to be successful as long as he is permitted to blame his violence on his victim.

One of the more useful functions of criminal prosecution of domestic abuse is that the abuser may be told in no uncertain terms by someone in authority that he is committing a crime and that he must stop. Even if he does not go to jail, and even if there is no counseling program available, the public humiliation of being told by a judge that he has no right to beat his wife may be effective. Men who batter do not have good control over their behavior; they rely on others to set limits on what is permissible. Mediation does not fulfill this function.

Even when not exercised, the power of a judge to issue jail sentences and to give orders which may be enforced by the police leads many defendants to take judicial action seriously. A mediator has no power. If the abuser leaves a mediation session and tears up the agreement, he has violated no law.

When a court hearing is completed and an order issued, there is some accountability - the abuser knows that if he violates the order he can be brought back into court. No such accountability exists following mediation. Stopping chronic violence is difficult even with agressive enforcement of all court orders, thorough supervision of abusers convicted of crimes, and intensive therapy. It is unlikely that one session with a lay person who has neither the authority of a judge nor the skills of a psychologist could stop the violence.

Finally, mediation generally involves only one session. If abusive behavior reflects the deeply held belief of a batterer that he can get what he wants through the use of force, one session is not enough.

From the experience of the Neighborhood Justice Centers (NJC), a group of mediation projects funded by LEAA, one might infer that mediation is inappropriate in most domestic violence cases. About half of the NJC caseloads consists of "interpersonal disputes in domestic, neighbor, family and other close relationships."[6] Domestic disputes were included in the caseloads of these mediation programs because, as the Final Evaluation Report on the Neighborhood Justice Centers explains:

> For disputes between couples or neighbors, etc., the traditional adjudication routes seem especially cumbersome and alienating, given that the problem is largely interpersonal and somewhat routine.... Moreover, there are doubts about the ultimate appropriateness of the courts as mechanisms to settle interpersonal disputes.[7]

The evaluation found, however, that mediation of domestic violence cases was less successful than had been anticipated. A group of NJC clients were asked whether mediation was a satisfactory means of resolving their disputes. There were larger percentages of dissatisfied respondents among those involved in family disputes and domestic assault than among parties to other types of cases.[8]

The evaluation found that effective resolution was more likely to be achieved through mediation in simple disputes than in more complex ones. At a Neighborhood Justice Center in Brooklyn, agreements between disputants in intimate relationships were found four times more likely to break down than agreements between parties with more tenuous relationships.[9] The report suggested some reasons for this pattern in the failure of mediation:

> [I]t is probably true that in most of the cases which are resolved the dispute is not tremendously complex or deeply rooted....the resolveable dispute is typically one which requires only the relatively brief intervention of a skilled third party. This view is supported by the evidence... which shows that when a dispute involves individuals with strong underlying problems, the likelihood of achieving a lasting resolution diminishes (emphasis added).[10]

Another program which mediates family violence cases is an LEAA demonstration project in Cleveland, Ohio.[11] The goal of the Cleveland program is not to provide a substitute for legal action, but to provide a model for intervention in cases which are not yet serious enough to require legal action.

The program set up a procedure under which police responding to a disturbance call issue a "Notice to Appear" to both parties, indicating the date and time that a mediator from the

Family Violence Program will meet with the parties to discuss their problems. The summons is printed on an official-looking police form, but participation in mediation is, in fact, voluntary.[12]

When the parties meet with a mediator, they may decide to set up a mediation session or they may decide to defer mediation until one or both parties receive some counseling. The experience of the program has been that in many cases, the couple is not ready for mediation when they first appear. Therefore, many parties see counselors at the Family Violence Program for several weeks prior to mediation.

The Notice to Appear Program was not as successful as first anticipated, because the police referred fewer cases to the program than had been anticipated. The low rate of referrals occurred partly because a new domestic violence law, which allowed police to make warrantless arrests, went into effect at the same time the program began.

Grace Kilbane, Director of the Witness/Victim Assistance Program (the parent agency of the Family Violence Program) identified some problems with the mediation procedure. First, Kilbane stated that because mediation is voluntary, the program cannot either require attendance or enforce the terms of the agreement. Second, it is difficult to determine whether a couple is ready to mediate, or how much counseling they will need before mediation is productive. Last, when counseling is needed, it is difficult to persuade batterers to participate on a voluntary basis. If only the victim receives counseling, successful mediation is unlikely.

It may be difficult to involve law enforcement officials in making referrals to a mediation program if there is some more traditional or more expedient legal remedy available. However, if courts and prosecutors cannot be persuaded to take more formal initiatives to prevent family violence, mediation may be a useful alternative.

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1. Prosecutors in Seattle, Westchester County, Philadelphia, Los Angeles, Portland, and Marin County report that charges are filed in 20 to 40 percent of the domestic violence reports or complaints screened by the prosecutor's office.

2. Warning Letter used by Westchester County District Attorney's Office at p. 67, *supra*.

3. Interview with Jeanine Pirro, Director of the Domestic Violence Unit of the Westchester County District Attorney's Office in White Plains, New York (September 18, 1979).

4. R. COOK, PHD., et al., NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT 1-7, 1980 (available from the National Institute of Justice).

5. *Id*. at 18 to 19 explains:

   A typical hearing progressed in the following fashion:

   (1) The mediator made an opening statement, introducing self, explaining the mediator's role, and describing the mediation process.
   (2) Each disputant was allowed to tell his or her side of the dispute without interruption.
   (3) The disputants and mediator discussed the issues, with the mediator asking clarifying questions and attempting to move the parties toward agreement.
   (4) Individual private caucuses may have been held with each disputant.
   (5) The joint session continued with fact-finding, review of the issues, and negotiation between the parties until an agreement was reached or it appeared there

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would be no agreement. Additional individual caucuses may have been held.

(6) If an agreement was reached, it was written and signed by both parties and the mediator. Copies were made for each disputant and the signed original was retained for the case file.

(7) Mediator thanked the parties for their participation.

6. *Id*. at 2.

7. *Id*.

8. *Id*. at 50.

9. *Id*. at 93.

10. *Id*. at 89; *see* W. FELSTINER AND L. WILLIAMS, COMMUNITY MEDIATION IN DORCHESTER, MASSACHUSETTS (1980) (available from the Government Printing Office 1980).

11. The description of the Cleveland program is based on interviews with Grace Kilbane, Director of the Witness/Victim Assistance Program, Bill Schwegler, Director of the Family Violence Program, and Fred Szabo, Assistant to Cleveland Police Chief Hannon, in Cleveland, Ohio (January 15-16, 1981).

12. *See* Appointment Form used by Family Violence Program in Cleveland, Ohio, at p. 78, *infra*.

CHAPTER FOUR

CONDITIONS ON PRETRIAL RELEASE

The first time a criminal defendant appears in court is to have bail set. If the defendant is charged with a crime of violence against his mate, his release may create a serious risk of physical harm to her. At the initial court appearance, the prosecutor may request that the court impose conditions on the defendant's release in addition to bail to prevent intimidation of witnesses or other interference with the prosecution. An abuser may be required to refrain from abuse of or contact with his mate or children, or to stay away from their home, her place of employment, school, or any other specified places, or to participate in counseling.

Since many family violence cases are dismissed long before a disposition is reached, imposing conditions on pretrial release may be the only opportunity for court intervention in these cases. Protection of complaining witnesses at this stage is important both because it may prevent further violence and because it may make successful prosecution more likely.

Conditions on release may be set at the discretion of the court but they are most effective when authorized by a statute which sets out precisely how such orders will be enforced.

JUDICIAL DISCRETION

Judges have broad discretion to impose conditions on the release of any criminal defendant, even without statutory authority. Many judges routinely prohibit suspects released on bail from having any written, personal, or oral contact with complaining witnesses while charges are pending, or from committing any violent acts.

Imposing conditions on release is occasionally challenged as unconstitutional, but the practice is widespread and is generally accepted even by defense attorneys.[1] In 1971, one challenge to the power of trial judges to place conditions on an accused without statutory authority was upheld by a federal court of appeals. The 7th Circuit Court of Appeals stated that:

> We have found nothing in the Wisconsin statutes which expressly grants to judges in criminal cases the authority to attach conditions to bail that do not directly relate to assuring the criminal defendant's appearance at trial. However, we think that in terms of a judge's "general jurisdiction over the subject matter," the defendant's judge here probably had minimal jurisdiction to attach at least *some* conditions to bail.[2]

The New Jersey Supreme Court stated *in dicta* that placement of conditions on pretrial release is a matter of discretion for the trial court. The court noted that the primary purpose of restrictions on release is to ensure the presence of the accused at trial, and that the right to bail should not be unduly burdened.[3]

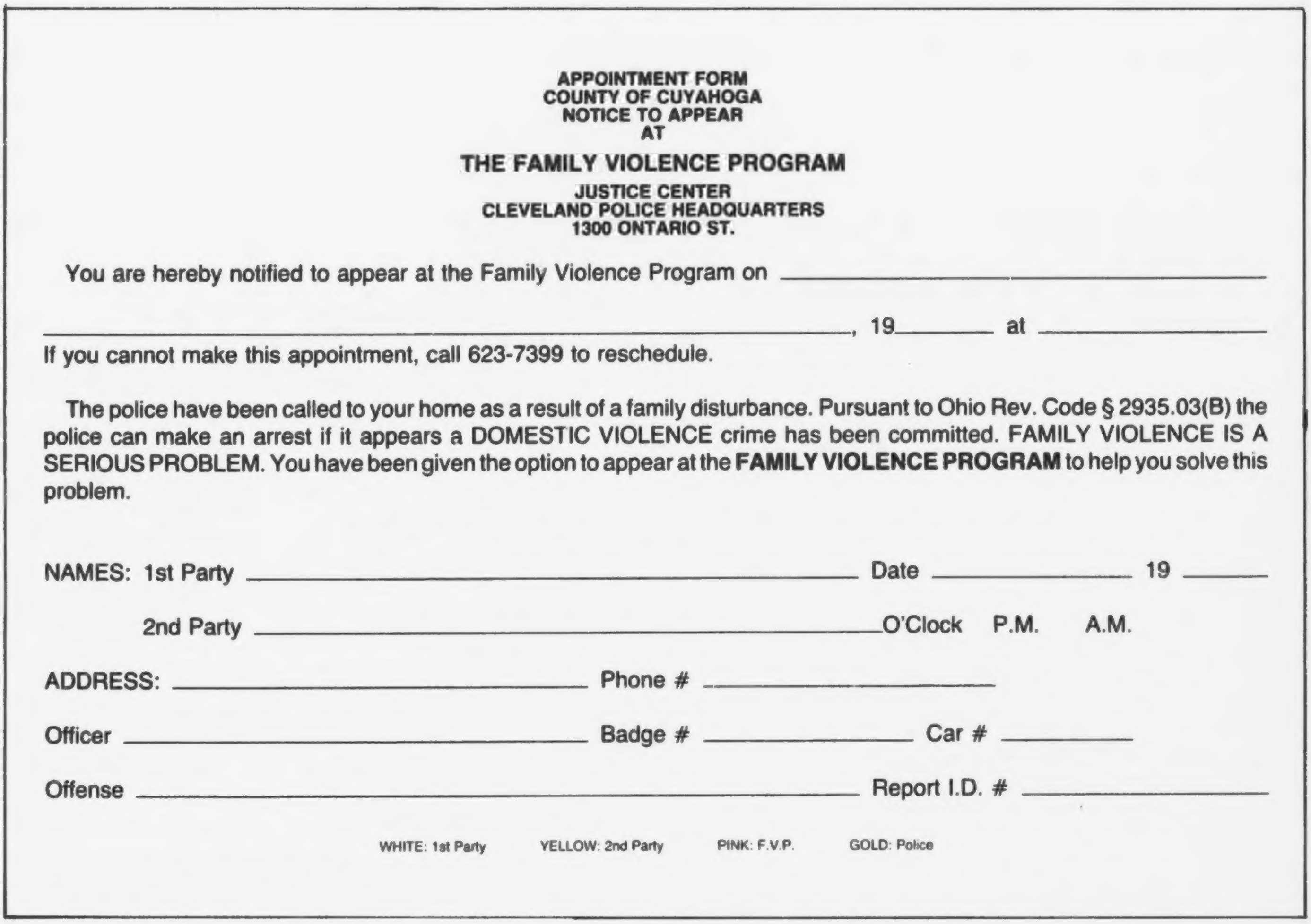
Other cases discussing conditions on release other than bail are focused on interpreting statutes which protect the legal process and the public through the allowance of restrictions on contact with witnesses, travel, or criminal acts.[4]

Judicial power to impose conditions on pretrial release might be challenged as a violation of the defendant's right to bail. The right to have bail set, however, is not a right to immediate and unconditional release. While some states set bail only to ensure a defendant's appearance at trial, most states allow restrictions on release either to assure appearance at trial or to prevent interference with the prosecution by protecting witnesses from intimidation.[5] Both refusal to set bail and setting bail higher than the accused can pay have been held not to violate defendants' rights.[6] If the state may detain a person to assure expedient prosecution, then it may also impose conditions on his release for the same purpose, since the latter is a less restrictive alternative.[7]

Most no-contact orders issued at bond hearings are delivered orally; neither the abuser, the victim, nor the police receive any written order. Violation of a no-contact order is contempt of court, punishable by a fine or a jail sentence, but violations are rarely prosecuted.

Though orders of this type may reduce the risk that the victim of abuse will be beaten when the abuser is released, the informal procedure for issuance of orders makes enforcement difficult.[8] Police called to a subsequent disturbance are unlikely to be aware of an existing order. If the victim cannot prove that a no-contact order was issued, police may be reluctant to make an arrest or to file a report unless serious injuries are visible.

The power to restrict an abuser's conduct may be more



APPOINTMENT FORM
COUNTY OF CUYAHOGA
NOTICE TO APPEAR
AT

THE FAMILY VIOLENCE PROGRAM

JUSTICE CENTER
CLEVELAND POLICE HEADQUARTERS
1300 ONTARIO ST.

You are hereby notified to appear at the Family Violence Program on ______________________________

____, 19______ at ______________

If you cannot make this appointment, call 623-7399 to reschedule.

The police have been called to your home as a result of a family disturbance. Pursuant to Ohio Rev. Code § 2935.03(B) the police can make an arrest if it appears a DOMESTIC VIOLENCE crime has been committed. FAMILY VIOLENCE IS A SERIOUS PROBLEM. You have been given the option to appear at the **FAMILY VIOLENCE PROGRAM** to help you solve this problem.

NAMES: 1st Party ______________________________ Date ______________ 19 ______

2nd Party ______________________________ O'Clock P.M. A.M.

ADDRESS: ______________________ Phone # ______________________

Officer ______________________ Badge # ______________ Car # __________

Offense ______________________________ Report I.D. # ______________

WHITE: 1st Party YELLOW: 2nd Party PINK: F.V.P. GOLD: Police

APPOINTMENT FORM

Police responding to family violence calls in Cleveland, Ohio use this form to make appointments with mediators for disputants.

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effectively exercised if a formal procedure is established for notice of orders, enforcement procedures, and penalties for violation.

STATE STATUTES

Statutes which specifically authorize the imposition of conditions on the pretrial release of defendants in family violence cases have been enacted in nine states.[9] Codification of procedures for imposing conditions on release is valuable because it encourages prosecutors to request no-contact orders, it encourages judges to exercise their discretion to prevent intimidation of victims, and it may provide specific procedures for police enforcement of judicial orders and penalties for violation.

Many of the statutes which give judges the power to impose conditions on the release of an abuser are too brief or general to provide complainants with effective protection while charges are pending. In Ohio and Maine, however, the conditional release laws spell out what protection is available, and specify procedures for police enforcement of judicial orders and penalties for violation. Under these laws, criminal courts may issue orders similar to the civil protection orders. Since the Ohio law has been in force longer than the Maine law, this discussion will focus on the Ohio law.

The Ohio statute makes intentional or reckless injury or attempted injury of a family or household member a separate criminal offense.[10] When a criminal charge of domestic violence is filed in Ohio, it may be accompanied by a motion requesting that a temporary protection order be issued as a condition of release in addition to bail, in order to ensure the safety of the complainant or other family or household members related to the defendant. A hearing must be held on the motion within twenty-four hours of the time it is filed. An order may be issued ex parte, but if so, another hearing must be held within twenty-four hours (during which the defendant is to be given notice) to determine whether the order should remain in effect, be modified, or be revoked.

The temporary protection order may require the defendant to refrain from causing or attempting to cause physical harm to the complainant, or to refrain from entering the residence, school, business, or place of employment of the woman. The order remains in effect only until the disposition of the criminal charge upon which it is based. If the order is violated, the batterer may be held in contempt of court and sentenced to a maximum of ten days in jail, or another order may be issued.

The statute allowing imposition of conditions on release was included in a package of legislation which also makes protection orders available from civil court. The civil and criminal orders are different in several respects. The criminal court order cannot award temporary support or child custody, nor can it enjoin disposition of property. The civil court order may last up to one year, while the criminal order must be dissolved when the criminal charge is disposed. A final difference is that the criminal protection order may be issued only against the defendant, while the civil order may restrict the conduct of both the batterer and the victim.

Staff of the Cleveland Family Violence Program report that temporary protection orders are issued in nearly every case in which criminal charges are filed under the domestic violence law, and that if the parties live together, the defendant is ordered to move out of the house as a matter of course.

Several problems with the statute have been identified by attorneys and judges in Ohio. First, the law makes no provision for issuance of a new but identical order as part of the sentence of a convicted batterer. Although the court has the power to impose restrictions on an offender as conditions of probation, it would be helpful to codify that power in the Ohio law. As it is, a victim who wishes to get a protection order after disposition of a criminal charge must initiate a new proceeding in civil court.[11]

Second, the statute is criticized because violation of the order is contempt of court rather than a misdemeanor offense. This means that police responding to a call from a victim who has obtained an order cannot make a warrantless arrest unless an assault has occurred. If violation of an order to vacate a residence were a misdemeanor, then under Ohio law the defendant's presence on the premises would be grounds for immediate arrest.[12]

Finally, the provision for issuance of ex parte orders by criminal court is criticized because a judge might hear evidence during an ex parte hearing which would be inadmissible to prove the guilt or innocence of the defendant at a later hearing. If the same judge then hears evidence on the criminal charge, the outcome of the criminal case might be tainted by the earlier hearing.[13]

Generally, experience with the Ohio statute has been positive. The law is valued particularly because it enables victims who are filing criminal charges to obtain a protection order without initiating a separate proceeding in civil court. Also, because the petitions are filed by prosecutors, complainants need not pay attorneys to obtain criminal protection orders.

LOCAL ORDINANCES

If a state legislature is not receptive to proposals to improve legal protection for battered women, or if it meets infrequently, it might be more productive to work for local ordinances authorizing conditions on release. One such ordinance has been passed in Seattle, Washington.[14]

The Washington state law allows a judge to issue a no-contact order as a condition of release in spouse abuse cases. The Seattle ordinance strengthens this provision by making violation of a no-contact order a misdemeanor, punishable by up to 180 days in jail or a fine of up to $500. The ordinance also allows the officer to make a warrantless arrest based on probable cause for violation of the order. (Under the state law, the defendant may not be arrested or detained based on violation of a no-contact order until the violation is adjudicated at a court hearing.)

Under the Seattle ordinance, the offender must sign the no-conduct order in front of a judge; a certified copy is provided to the victim. Orders are entered into a computer so that police responding to disturbance calls can check for orders against the abuser. This means that when the officers arrive on the scene of a domestic dispute, they know what violence has preceded the current incident and whether they have the power to make a warrantless arrest.

The ordinance also makes the police immune from civil liability, and provides that in civil actions arising from domestic violence cases, police officers will be represented at the expense of the city.

The experience with criminal protection orders in Ohio and with civil protection order laws in other states suggests that an explicit statute authorizing conditions on release is useful in protecting witnesses in family violence cases from intimidation.

MODEL LEGISLATION

A model conditional release law might include the following provisions:

1) Prevent interference with the prosecution by allowing imposition of restrictions on the release of any defendant charged with violence or threatened or attempted violence against, or harassment of, any person with whom the defendant

is residing or has resided, or with whom he is or was intimate.[15]

2) Provide for renewal of a protection order if the defendant should be convicted, as a condition of probation.[16] The court's initial power over the abuser is based on protection of the orderly administration of justice. The initial order must terminate when a disposition is reached, or else it amounts to punishment without proof of guilt. However, should the defendant plead guilty or be convicted, his conduct may be restricted as part of his sentence.

A question might be raised as to why the criminal court should issue protection orders, rather than refer the victim for a civil order. One reason is simple expediency; why do in two proceedings what could be done in one? Many victims must elect between criminal and civil relief, if only because the time required to undertake both procedures would jeopardize continued employment. Also the interest of the court in controlling its caseload argues for consolidation of proceedings whenever possible.

Another reason for giving criminal courts separate authority to protect victims of abuse is that the criminal protection order may be available to a wider group of victims than the civil orders. Many civil protection order laws are available only to victims who are married and/or have filed for divorce. Criminal assault laws, on the other hand, may be enforced regardless of the relationship of the two parties. New legislation should point out the acute need for protection in domestic abuse cases, but need not restrict eligibility for criminal protection orders to parties with certain relationships. Instead, the law might define who can get a criminal protection order by requiring evidence that witness intimidation is likely.

3) A list of restrictions which may be included in the injunction. This will familiarize judges with the particular needs of battered women, and will facilitate design of petition forms which list the types of protection available under the law.[17] The statute could require that persons charged with domestic abuse:

- Refrain from assaulting, beating, molesting, wounding, confining, or threatening a victim;[18]
- Stay away from the home, school, business, or place of employment of the victim;[19]
- Not visit, or visit only at certain times under certain conditions, any child residing with the victim;[20]
- Be released into the custody of a designated person or organization agreeing to supervise him or her;[21]
- Move out of the residence shared with the victim, even if the title or lease is in his name only,[22] or provide alternate housing for the victim and any children;[23]
- Participate in a counseling program for batterers designed to assist in preventing violent incidents;[24]
- Refrain from any conduct intended to discourage the victim from reporting incidents of violence, filing criminal charges, or testifying in a trial of charges filed;[25]
- Do, or refrain from doing, other acts specified by the courts.[26]

4) Penalties and procedures for enforcement. Criminal

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protection orders should be issued in writing, and copies supplied to the defendant, the victim, and the local police department.[27] Violation of a criminal protection order should be made a criminal offense.

Police should be permitted to make a warrantless arrest of an abuser if they have probable cause to believe he has violated a condition of his release, whether or not the violation occurred in their presence.[28] The police department should be required by the statute to set up a procedure for informing officers responding to a domestic disturbance call that the abuser is subject to a court order restricting his conduct.[29]

In addition, the statute might list procedures to be followed by police responding to a disturbance call where an order is in effect, such as:

- Transporting the victim to a hospital or shelter if she is injured or desires to leave the residence;
- Informing her of her legal right to have the order enforced;
- Remaining at the scene until the victim is no longer in danger if an arrest is not made;
- Filing a report on the violation with the police department, and sending a copy to the prosecutor within 24 hours.[30]

If the injunction requires that the abuser move out of the residence, the police should be required by law to supervise his immediate eviction.

It is widely believed that court orders restricting conduct of batterers are effective in reducing or preventing violence. Use of such orders while criminal charges are pending may facilitate prosecution of spouse abuse cases. The extent to which intimidation of witnesses is reduced by such orders needs further study.

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1. *See* NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION: PRETRIAL RELEASE, 21-24, 29-34 (1978).

2. Jacobson v. Schaefer, 441 F. 2d 127, 130 (7th Cir. 1971) (imposition of conditions on release in addition to bail found within the proper scope of judicial discretion of state trial judge). This question has not been addressed by any other federal court, except as to the setting of bail in federal cases. Federal courts are governed by the Bail Reform Act of 1966, which requires the use of non-monetary conditions on release in preference to money bail where other restrictions will insure appearance at trial. U.S. v. Leathers, 412 F. 2d 169, 171 (D.C. Cir. 1969).

3. State v. Johnson 294 A. 2d 245, 252, 61 N.J. 351 (N.J. S. Ct. 1972).

4. *E.g.*, State v. McInnis 328 A. 2d 400, 133 Vt. 20 (Vt. S. Ct. 1974); People v. Ealy, 365 N.E. 2d 149, 49 Ill. App. 3d 922, 7 Ill. Dec. 864 (Ill. App. Ct. 1977).

5. ABA, REDUCING VICTIM/WITNESS INTIMIDATION 12 (1979).

6. *See* Chapter Seven, "Post-Arrest Detention" *infra*.

7. Pugh v. Rainwater, 572 F. 2d 1053 (5th Cir. 1978), Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972); Wyatt v. Stickney, 349 F. Supp. (M.D. Ala. 1972), Dixon v. Weinberger, 405 F. Supp. 974 (D. D.C. 1975).

8. Telephone interview with Helen Smith, Assistant District Attorney, Portland, Oregon (July 1980).

9. ARIZ. REV. STAT. § 13-3601(C) (Supp. 1980); ME. REV. STAT. ANN. tit. 15, § 301 (Supp. 1980-1981); MASS. GEN. LAWS ANN. ch. 276, § 42A (West 1972 and Supp. 1980-1981); MINN. STAT. ANN. § 629.72 (Supp. 1980); N.Y. CRIM. PROC. LAW § 530.11 (McKinney Supp. 1980-1981); N.C. GEN. STAT. § 15A-534.1 (Supp. No. 5, 1979); OHIO REV. CODE ANN. § 2919.26 (Page 1979); WASH. REV. CODE ANN. § 10.99.010 (Supp. 1980-1981); WIS. STAT. ANN. § 969.02 (West 19__).

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10. OHIO REV. CODE ANN. § 2919.26 (Page Supp. 1980).

11. Telephone interview with Robert Mapes, Esq., of Ohio State Legal Services, Columbus, Ohio (Feb. 1980).

12. Interview with Chris McMonagle, Esq., in Cleveland, Ohio (Jan. 19, 1981).

13. Crane, The Domestic Violence Act: Amended Sub-House Bill #835, Cuyahoga County Criminal Courts Bar Association Newsletter (July 1979).

14. Seattle Criminal Code §§ 12A.04.195 to 12.04.198 (1980).

15. *E.g.*, ME. REV. STAT. ANN. tit. 19, § 762 (19__) (enacted 1980).

16. *E.g.*, N.Y. CRIM. PROC. LAW § 530.11 (McKinney Supp. 1980-1981).

17. Many courts which issue protection orders use form petitions which have a space to list the facts upon which the request for the injunction is based, and then a list of all available relief, with space for the petitioner or an attorney to place a checkmark beside each form of relief requested.

18. *E.g.*, N.C. GEN. STAT. § 15A-534.1 (Supp. No. 5, 1979).

19. *E.g.*, ME. REV. STAT. ANN. tit. 15, § 301 (Supp. 1980-1981).

20. *Id.*

21. *E.g.*, WIS. STAT. ANN. § 969.02 (West 19___).

22. *E.g.*, OHIO REV. CODE ANN. § 3113.31(E)(1)(c) (Page Supp. 1980).

23. *Id.*

24. ARIZ. REV. STAT. ANN. § 13-3601(C) (Supp. 1980).

25. ABA, *supra* note 5.

26. ARIZ. REV. STAT. ANN. § 13-3601(C) (Supp. 1980).

27. *E.g.*, N.Y. CRIM. PROC. LAW § 530.11 (McKinney Supp. 1980-1981).

28. *See* OR. REV. STAT. § 133.055(2) (1977), which requires police officers who have probable cause to believe an assault has occurred or been threatened between spouses, cohabitants, or former spouses or cohabitants, to arrest the alleged assailant unless the victim objects.

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29. _E.g._, OR. REV. STAT. § 107.720 (1979).

30. _E.g_, WASH. REV. CODE ANN. § 10.99.010 (Supp. 1980-1981).

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CHAPTER FIVE

POST-CHARGE DIVERSION

Diversion or deferred prosecution is an alternative to traditional criminal case processing in which prosecution is suspended while a defendant completes a counseling program. Successful completion results in dismissal of charges. Diversion of domestic violence cases provides a means of obtaining immediate and effective control over a group of defendants who have largely eluded criminal justice intervention.[1] The leverage obtained over batterers admitted to a diversion program may be used to require participation in a counseling program focused on stopping violence and/or alcohol abuse. While few batterers voluntarily participate in counseling, many accept treatment ordered by the courts.

Deferred prosecution is not new. During the last decade, many criminal courts made it a standard practice to divert offenders who have no criminal record. Most diversion programs do not admit persons charged with crimes of violence. However, prosecutors in Miami, Florida, Marin County and Santa Barbara, California, and in Portland, Oregon have found diversion to be an effective way of handling domestic violence cases. In several states, statutes have been enacted which lay out procedures for domestic abuse diversion programs.

Prosecution may be deferred after a defendant is charged with a crime, at any point prior to a final adjudication of guilt. A defendant accepted by a diversion program makes a contract with the program to comply with certain requirements, such as attending counseling sessions and refraining from violence. If the defendant fulfills the requirements of the contract for the period agreed upon, charges are dropped, and the defendant's arrest record may be expunged. If the defendant fails to comply with the terms of his contract, prosecution is resumed.

AN AID TO PROSECUTORS

Diversion may solve some of the practical and institutional problems confronted by prosecutors in handling domestic violence cases. Most charges filed against batterers are dismissed on the request of the victim or on her failure to appear in court. The few defendants who are convicted are most often given a short sentence of unsupervised probation. Admitting an abuser to a deferred prosecution program after charges are filed eliminates both the problems of complainant withdrawal and ineffectual sentencing.

A good diversion program can reduce the time prosecutors and judges spend on domestic violence cases. If a defendant successfully completes a diversion program, only two hearings occur - one when the batterer is formally accepted into the program, and one when he completes the program and charges are dropped.

Deferred prosecution, however, may not be less expensive than processing a case in court. There must be staff to screen, refer, and track cases accepted for diversion. The state must pay for counseling of indigent defendants, and long-term counseling may be necessary to reduce the likelihood of subsequent violence. While the overall cost to the system may not drop, time and money may be more usefully spent on counseling programs for batterers than on charging cases which never reach disposition.

A diversion program may be established by statute, by court rule, or by administrative policy. While statutory authority is not needed to set up a diversion program, implementation of statewide programs may be facilitated by legislation which lays out procedures for diversion. Comprehensive legislation on diversion of domestic violence cases has been passed in California, Arizona, and Wisconsin.[2]

PLANNING FOR ABUSE COUNSELING

If the court system processes large numbers of family violence cases, community mental health agencies must be encouraged to develop special programs for abusers, and, if possible, to bring in therapists who have experience with abuser counseling to train those who will work in the program. Defendant batterers may then be referred to such programs. The field of abuser counseling is in its infancy, but many psychologists agree that the court system and the mental health system may be more effective in reducing family violence by collaboration than by separate efforts.

Some therapists feel that group therapy is more effective

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in stopping battering than either individual or family therapy. Group therapy is an efficient use of counseling resources, and less expensive than individual therapy. Group therapy provides a setting in which batterers may identify and articulate their feelings about their violent behavior. Many men who batter do not have close relationships with other men, and are unaware that other men are similarly trapped in patterns of violence which they feel helpless to control. Relief from their isolation encourages batterers to stop denying responsibility for the violence and to solve problems by talking with other people about them. As some members of a therapy group gain control of their behavior, they become models for the others.[3]

Use of family therapy to treat the abuser and his family is criticized by many psychologists because family therapists treat problems as a function of the group process, and not as the responsibility of one member of the group. In many violent relationships, both the victim and the abuser blame the victim for the violence. Family therapy may be ineffective in interrupting this pattern.

Therapists report that batterers are most susceptible to treatment immediately after a violent incident, because the batterer is unable to deny or minimize his behavior when the memory is so recent, and because he may be very afraid that his wife will leave him because of the beating. Counseling may be effective, then, when initiated early in the criminal process. For example, Domestic Intervention Program staff in Miami, who see many abusers within 24 hours of an assault which led to arrest, report that communication between the batterer and therapist is more difficult when they meet after a delay of even a few days than when they meet immediately after the abuse occurs.[4] In setting up a system for handling spouse abuse cases, prosecutors should keep in mind the importance of immediate intervention, and design a system which will minimize the time required for processing a case.

HOW DIVERSION WORKS

Though information is drawn from a wide variety of sources, the following discussion on how a diversion program works, and how it may be designed to prevent subsequent violence without violating defendants' constitutional rights focuses on the Domestic Intervention Program (DIP) in the State's Attorney's Office in Miami, Florida (one of the LEAA Family Violence Demonstration Projects). One component of this project, the Post-Arrest Unit, is a model diversion program for batterers. The unit screens abusers for admission to the program, provides counseling and makes referrals, and monitors the progress of participants in the program.

ADMISSION CRITERIA

Historically, many diversion programs have admitted only nonviolent first offenders, on the premise that those who commit violent offenses should be prosecuted to the full extent of the law. Spouse abuse cases, even though they involve

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violent crimes, are good candidates for diversion because successful prosecution of these cases is so rare. Even con-convicted batterers are more often sentenced to counseling than incarceration. In light of the fact that batterers can be placed more quickly in counseling through diversion, diversion may be preferred over prosecution on grounds of expendiency.

Though traditional prosecution may not be useful or necessary in all such cases, batterers charged with assault must be carefully screened for admission to a diversion program to exclude cases in which the violence is extreme or in which the batterer has a long criminal record. The Miami domestic intervention program allows abusers to participate in diversion if:

- There has been no prior arrest for a violent crime. Batterers who have had prior experience with the criminal justice system may recognize diversion as an easy way out, and use the program to avoid more serious consequences. They tend to be less receptive to counseling, and to take other demands of the program less seriously than abusers who have not been arrested before.

- The defendant consents to participate. Because diversion usually occurs before any adjudication of guilt, the protection of the defendant's rights require that his participation be voluntary. The defendant has a right to have the offense adjudicated, and the courts have no power to impose penalties for an offense charged unless a conviction is obtained. Because the conditions of diversion are the same as some of the sanctions which might be imposed after conviction, the protection of the abuser's rights require that his consent be obtained.

- The victim consents to the abuser's participation in the diversion program. Diversion should not occur if a victim of abuse feels that prosecution and incarceration is more appropriate, or if she

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is afraid for her safety and does not want the abuser to be released. The option to veto diversion gives the victim, perhaps for the first time, control over the conduct of the abuser. This changes the balance of power between the parties, gives the abuser a clear message that he has violated the victim's rights, and encourages the victim to make decisions about her life.

- The counselor who initially interviews the abuser feels confident that the abuser's participation in the program would be sincere, that he is motivated to change, and that he is unlikely to injure the victim during diversion.

During 1979 and 1980, 169 batterers were accepted by the Post-Arrest Unit. Abusers who satisfy the criteria for admission are accepted if the counselors in the Unit have space in their caseloads. Screening is a critical element of any diversion program, both because many abusers may not be susceptible to treatment and because treatment may be more effective if each counselor has some control over the size of his or her caseload.[5]

PROTECTING THE DEFENDANT'S RIGHTS

In planning a diversion program, careful consideration must be given to the defendants' constitutional rights. While protection of these rights may be at odds with considerations of efficiency and minimizing the cost of the program, constitutional mandates may not be subjected to a cost-benefit analysis. Each defendant who participates in a diversion program must waive certain constitutional rights, including "his right to have the government prove his guilt beyond a reasonable doubt, his right to confront his accusers, and his right

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to a speedy trial.[6] In McMann v. Richardson, the Supreme Court stated that "waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences."[7]

In Brady v. United States, the Court set standards for what constitutes a voluntary waiver of rights in negotiating a guilty plea. The court held that waiver of rights for the purpose of obtaining a lesser penalty is not involuntary, as long as it is knowing and intelligent. One primary consideration in the finding that the waiver in question was voluntary was that the defendant had had the assistance of competent counsel.[8] One commentator has suggested that these standards should be applicable in considering whether entry into a diversion program is voluntary.[9]

It is critical to the protection of his rights that a batterer admitted to a diversion program have an opportunity to consult an attorney before prosecution is suspended. To ensure that counsel will be available, diversion must be initiated at a point considered to be a "critical stage" of prosecution. Whether a proceeding is a critical stage depends on "whether potential substantial prejudice to a defendants' rights inheres in the ... confrontation, and (on) the ability of counsel to help avoid that prejudice.[10] In Brewer v. Williams,[11] the Court stated that "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[12]

Diversion should not be initiated until after charges are filed. This ensures that the defendant will not waive his rights without knowing what charges he faces; also it protects his right to consult a lawyer about whether it is in his best interest to waive his rights.

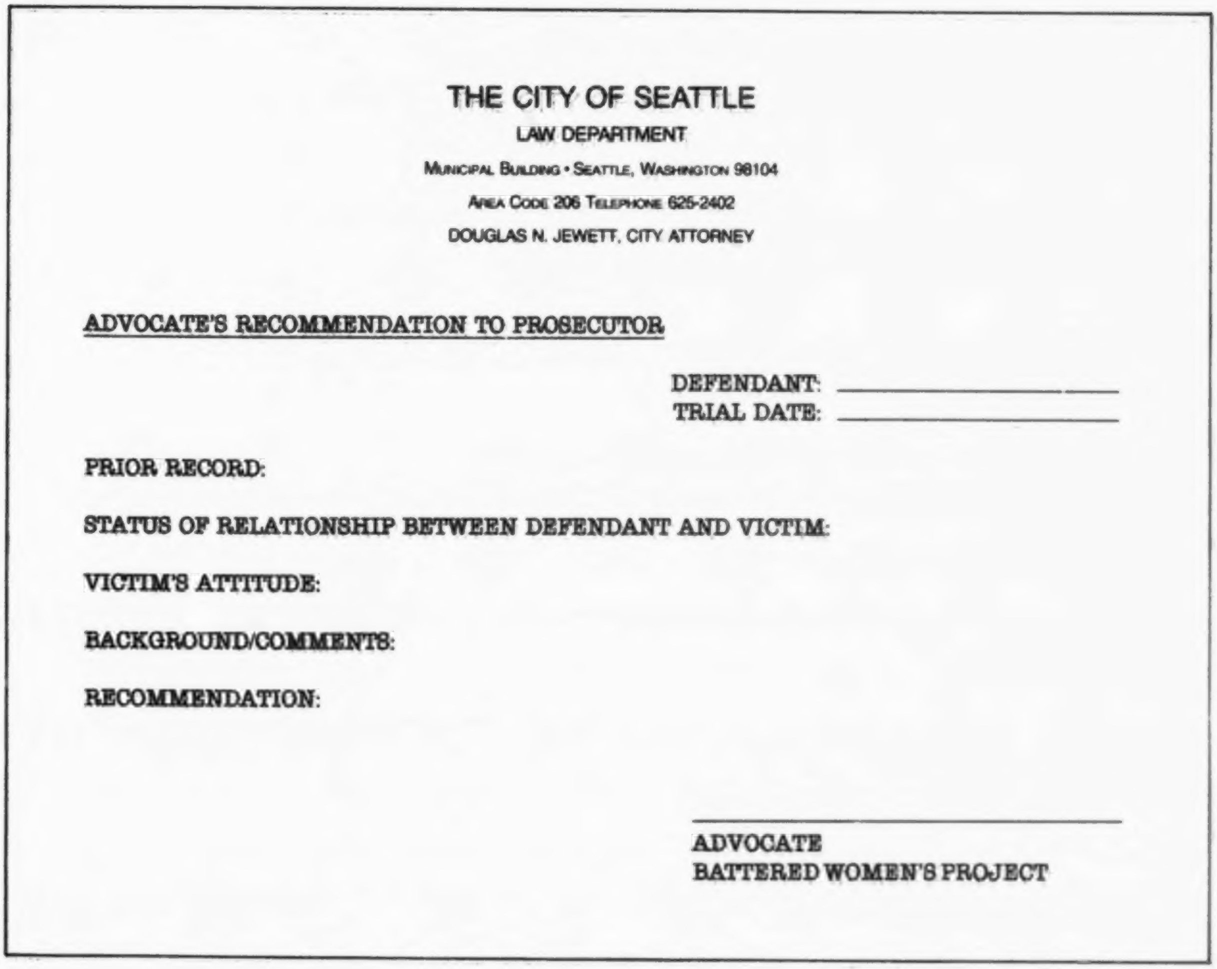
Another reason that charges should be filed prior to diversion is to protect defendants' fourth amendment right to a "judicial determination of probable cause as prerequisite to extended restraint of liberty following arrest."[13] In Gerstein v. Pugh, the Court found that imposing conditions on release of a defendant following arrest could constitute "a significant restraint on liberty."[14] In such cases, where a charge is initiated by a warrantless arrest, Gerstein could be interpreted to require filing of charges prior to diversion.

By giving a defendant an opportunity to discuss options with an attorney prior to diversion, and by deferring admission to a diversion program until after charges have been filed, program planners can protect defendants' constitutional rights. These protections will prevent inappropriate or coercive uses of diversion and are important to the development of a sound program.

ADMISSION PROCESS

Admission of criminal defendants to a diversion program involves four steps: identification of candidates, interviews to determine their eligibility, review of the charges by a judge who releases them to a diversion program, and finally, a meeting of program staff and defendants to fill out written waivers of certain rights, to draw up a contract specifying the terms of participation, and to arrange referral to counseling.

Staff of the Miami Domestic Intervention Program (DIP) identify domestic violence cases by screening police arrest reports and by attending preliminary hearings. A DIP staff member goes to the jail each morning and reads the list of persons arrested the night before. Generally aggravated assault and burglary charges are examined to determine the relationship of the parties. Persons arrested for family violence and held overnight are interviewed in jail before the bond hearings that morning to determine their eligibility for diversion. Other cases are identified by a DIP staff member who attends the felony and the misdemeanor bond hearings each day. Judges are asked to release selected cases to the family violence programs. Some misdemeanor cases reach the Post-Arrest Unit through a victim complaint to the Pre-Arrest Unit, which is mainly concerned with services to victims. If charges are filed, the batterer may be admitted to the diversion program after he is arrested or summoned to court.



THE CITY OF SEATTLE
LAW DEPARTMENT
Municipal Building • Seattle, Washington 98104
Area Code 206 Telephone 625-2402
DOUGLAS N. JEWETT, CITY ATTORNEY

ADVOCATE'S RECOMMENDATION TO PROSECUTOR

DEFENDANT: ____________________
TRIAL DATE: ____________________

PRIOR RECORD:

STATUS OF RELATIONSHIP BETWEEN DEFENDANT AND VICTIM:

VICTIM'S ATTITUDE:

BACKGROUND/COMMENTS:

RECOMMENDATION:

____
ADVOCATE
BATTERED WOMEN'S PROJECT

SENTENCING RECOMMENDATIONS
This form is filled out by a victim advocate for each domestic violence case to advise the prosecutor (who is usually unfamiliar with the case) of what sentence should be recommended.

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During the jail interview, the DIP staff member determines the seriousness of the violence which led to arrest and whether the defendant has a prior record or is "wise" to the criminal justice system. An assessment is made of the arrestee's attitude toward counseling, of whether he would use the program as an easy way out of the charge or would make a commitment to deal with his violence. During the interview, the staff person calls the victim to ask whether she consents to the batterer's participation in the program.

In their first year annual report, the DIP Program reported that the "jail interview procedure continues to represent the greatest impact upon defendants at a time when their motivation for behavioral change is at its peak."

After the bail hearing, at which the defendant is released into the program, the offender returns to the DIP office to sign waivers of his right to speedy trial and of the statute of limitations. Once each week the counselors in the post-arrest unit meet to discuss acceptance of new clients and to assign each client to one of four counselors who work in the unit.

Some batterers who are arrested are released from jail on bail before they can be interviewed by DIP staff. After release, the next stage at which defendants eligible for diversion can be identified by DIP staff is at a pretrial conference between the victim and an Assistant State Attorney. DIP staff often attend these meetings. Eligible defendants identified at this stage are diverted at the arraignment. Diversion after arraignment, which takes place two weeks after the arrest, is less effective than after a bond hearing because, as dicussed earlier, abusers are observed to be most receptive to treatment if counseling begins immediately after a battering incident.

CONDITIONS OF PARTICIPATION

There is general agreement on some basic requirements that should be imposed on a batterer admitted to a diversion program. Defendants admitted to a program should identify goals to be accomplished during the period of diversion and participate in developing a plan by which those goals may be attained. During the period of diversion, regular and frequent contact between the participants and the program staff must be maintained.

Requirements of some diversion programs include:

1) that the abuser participate in weekly counseling focused on stopping the violence for 6 months to 1 year;

2) that he avoid conduct which could lead to rearrest;

3) that the abuser avoid all contact or communication with his victim during the period of diversion;

4) that he visit his children only at times specified by the court; and

5) that he repay the victim for any medical expenses incurred, wages lost, or property damaged as a result of the battering incident which led to filing of charges.

The Miami diversion program requires participants to attend weekly therapy, which is conducted either with individuals, couples, or groups. In all cases the victim is invited to visit the program, and is offered counseling (most often separate from the abuser). Of the abusers admitted to the Post-Arrest Unit, 90 percent receive counseling from the four therapists in the unit; the other 10 percent are referred to outside therapists. Where a batterer also has drug or alcohol abuse problems, he is referred to a counseling program which specializes in substance abuse, either instead of or in addition to the abuser counseling program.

The duration of the counseling is determined by the therapist's assessment of the abuser's progress. Eleven percent of the abusers admitted during 1980 received counseling for one to three months, 31 percent for three to six months, 25 percent for six to nine months, and 29 percent for over 9 months. Four percent received counseling for less than one month. After release, abusers are offered follow-up counseling for three months.[15] To be discharged successfully from the program, the abuser must attend counseling sessions and, in the view of his counselor, must make a sincere effort to deal with his violent behavior.

TRACKING

Careful supervision of batterers (otherwise known as tracking cases), is critical to the success of family violence diversion programs. In many diversion programs, screening, referral, and tracking are conducted by one agency, often part of the court system or the prosecutor's office, and counseling is handled by community mental health agencies. Others such as the Miami program both provide services to defendants and follow the progress of each defendant with the court system.

There are good arguments in support of both models. It may be desirable to separate functions to use the expertise of an agency which specializes in tracking large numbers of cases. If no such agency is present, or if the caseload is not so large as to require separation of functions, it may be preferable to delegate the tracking function to a counseling agency, which will have regular contact with participants.

The Miami program staff who work with batterers handle both counseling and tracking. Batterers see a therapist or participate in a therapy group each week. Also, DIP staff maintain contact with the victims, even if they are seeing counselors outside the program. Victims are strongly encouraged to report any violation of conditions of diversion or any violent incidents. In addition, the program works closely with a special police unit in Miami, and maintains regular contact on problematic cases.

One model of a program in which tracking and counseling functions are separated is NEXUS, a program in Philadelphia which tracks about 700 clients referred by the courts for counseling on alcohol or drug problems. The NEXUS system may be useful to family violence programs.

NEXUS staff obtain information about whether the defendants have been rearrested from computer records kept by the court. To track participation in counseling, NEXUS staff keep lists of defendants referred to each participating mental health agency, and make weekly calls to each agency to check client attendance. If a defendant misses an appointment, his name is tagged by the tracking staff. If a second session is missed, NEXUS staff attempt to contact the delinquent defendant to find out why he has not appeared. If the nonattendance persists the offender is returned to court for a hearing on violation of the terms of his diversion. (A similar warning system is used in Miami except that the defendant is contacted by the therapist to whom he has been assigned.)

If counseling and tracking are handled by different agencies, monitoring may be facilitated by making referrals to a few mental health agencies which have expertise in working with violent families, or with alcoholics. Counselors at these agencies should be asked to make available attendance reports on court-referred clients at a designated time each week. Attendance reports may then be collected by diversion program staff during phone calls to each agency at the times agreed upon.[16]

TERMINATING DIVERSION

A batterer's participation in a diversion program may be terminated by the dropping of charges when he successfully completes the terms of his agreement with the program.. If a batterer fails to appear for counseling or violates other terms of his agreement, diversion is terminated and prosecution is resumed. It is critical that when a defendant is dropped from a diversion program, that prosecution be carried through. Prosecutors should be acquainted with techniques for ensuring victim cooperation to facilitate successful prosecution where diversion is unsuccessful. The diversion program should follow cases dropped from the program through the criminal justice system to ensure that those cases received proper attention.

Defendants should be informed at the time of admission to a diversion program of conduct which will lead to resumption of prosecution. Those returned to the State Attorney should be given written reasons for their termination; these statements should not, however, be admissible as evidence against them.

If an abuser participating in the Miami program fails to keep an appointment with his therapist, he is sent a warning letter and asked to come to the DIP office. If he fails to appear, diversion is terminated and prosecution is resumed. Similarly, if he is rearrested, if he commits further abuse, or if he violates an agreement to avoid contact with the victim, the batterer may be dropped from the program, and the case returned to the State Attorney.

In Miami when an abuser successfully completes the diversion program, DIP staff request at a hearing held before a judge that criminal charges be dropped and, if the charge was initiated by arrest, that the abuser's arrest record be expunged.[17] Record expungement is a significant motivating factor for abusers who have no prior criminal record, according to DIP staff.

The Miami criminal justice system pays careful attention to batterers admitted to the diversion program. However, many of the cases which are initially rejected by or dropped from the program are never prosecuted to disposition. The State Attorney's Office does not keep systematic data on domestic violence cases, but several prosecutors in the State Attorney's Office stated that the vast majority of criminal cases which are not diverted are dropped prior to disposition at the request of the victim.

CONFIDENTIALITY

Therapists who work with batterers referred to them by courts cannot win the trust of their clients unless the confidentiality of the counseling relationship is protected. Yet, if prosecution is resumed after a batterer is dropped from a diversion program, either the prosecution or the defense may subpoena records kept on a defendant during diversion.

In many states the confidentiality of communications between therapists and clients is protected by statute. Some of these statutes cover psychiatrists and psychologists, but do not privilege social worker/client communications. Relevant state law should be carefully examined when a diversion program is designed, so that new law or informal agreements can protect the confidentiality of those communications not covered by the existing law.

Even if the communications between a counselor and a defendant are protected, other records kept by the diversion program, such as notes taken during intake interviews, may be subject to court subpoena.

If diversion is established by statute, the law should provide that program records be kept confidential and not be released without the defendant's consent. If it is necessary for the diversion program to share information with a mental health or other agency, clients should be asked to give written permission to release information.[18]

If a diversion program is set up without a statute, agreements should be made with both prosecutors and defense attorneys that, to protect the credibility of the diversion program, records will not be subpoenaed for use in prosecution or defense of persons who have participated in the diversion program. Barbara Kauffman, the Director of the Domestic Intervention Program in Miami, reports that such an informal agreement with prosecutors and defense attorneys has protected program records from court subpoena.

In New Jersey the confidentiality of diversion records is protected by a court rule which states that "during the conduct of hearings subsequent to an order returning the defendant to prosecution in the ordinary course, no program records, investigative reports, reports made for a court or prosecuting attorney, or statements made by the defendant to program staff shall be admissible in evidence against such defendant."[19]

IS DIVERSION EFFECTIVE?

Participants in an LEAA-sponsored conference on programs for men who batter agreed that therapy groups for men who batter are effective in reducing violence. Although many mental health practitioners believe that counseling is ineffective unless the client's participation is voluntary, experience during the last few years with court-mandated treatment for abusers suggests that the opposite may be the case.[20] It is characteristic of batterers to deny responsibility for their abusive behavior, and to be unwilling to seek help. Also, batterers are often externally motivated and do what is required of them more willingly than they take steps by themselves to change their behavior.[21] Without a court order, few batterers seek treatment; where counseling is ordered by a court, a majority are receptive to therapy.[22] Vicki Boyd, a psychologist in Seattle, cautions that while violent behavior may change, it is difficult to bring about extensive psychic changes through court-mandated counseling.[23]

There are several characteristics of diversion which make it effective in domestic violence cases. First, a diversion program may be structured to maximize the impact of counseling. In Miami, the abuser is placed in a counseling program within

24 hours of the battering incident. If he has just spent the night in jail, and is released based on his admission to the program, then he identifies the program as the agency which got him out of jail. This may increase his trust of the therapist because the program has done him a favor. Also, the therapist may provide emotional support during the crisis which so often follows an acute battering incident, in which the batterer is fearful about his mate leaving him and feels guilty about his violence.

Second, diversion eliminates the long delay between charge and disposition that is likely if the case is prosecuted. Most men arrested for wifebeating are released on bail, and asked to appear for an arraignment two weeks later. During those two weeks, the defendant's normal life resumes; the disruption caused by the criminal charge and the threat of prosecution diminish with each delay. After the arraignment, months may pass prior to trial. In the meantime, he may make up with his mate, or discourage her from prosecuting, either by courting her or by threatening injury if charges are not dropped.

While the Miami program does not conduct any systematic follow-up to determine how many of the batterers who have participated in the program continue to be violent, the program has gathered some useful information. Of 260 cases closed by the program during 1979 and 1980, only eleven defendants were unsuccesfully terminated because they were rearrested. (This includes those rearrested during the 1980 riots in Miami.) Of

260 cases closed by the Domestic Intervention Project during its first two years, 196 cases were successfully terminated. At least during the period of diversion, the vast majority of abusers participating were not violent toward their mates.

Only six cases were terminated because the victim withdrew charges after diversion had been initiated. This suggests that the primary problem with prosecuting spouse abuse, that of victims dropping charges, is simply nonexistent if prosecution is deferred and the abuser is ordered into counseling.[24]

Another diversion program run by the District Attorney in Portland, Oregon likewise reports few incidents of violence committed by participants. As in Miami, abusers admitted to the program participate in weekly counseling for an average of six months. Only 3 out of 39 batterers accepted into the diversion program during the first ten months of 1980 committed any act of violence while in the program. Two of those incidents involved violence against a mate or family member of the abuser.[25] No one knows how many of the abusers participating in these diversion programs would have, but for the program, committed another assault against their mates. Nevertheless, the low levels of recurrence of violence among participants suggest that these programs may deter a significant number of assaults.

---

1. The National Association of Pretrial Services Agencies defines diversion to include any dispositional practice if: 1) it offers persons charged with criminal offenses

alternatives to traditional criminal justice or juvenile justice proceedings; 2) it permits participation by the accused only on a voluntary basis; 3) the accused has access to counsel prior to a decision to participate; 4) it occurs no sooner than the filing of formal charges and no later than a final adjudication of guilt; and 5) it results in dismissal of charges, or its equivalent, if the divertee successfully completes the diversion process. NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PERFORMANCE STANDARDS AND GOALS PRETRIAL RELEASE AND DIVERSION [hereinafter cited as PRETRIAL DIVERSION] 5 (1978); see NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS 27-31 (1973).

2. Arizona, California, and Wisconsin specify certain conditions that must be met before an abuser may be admitted to a deferred prosecution program.

In Arizona, deferred prosecution is unavailable if the abuser has a prior criminal conviction or has in the past been unsatisfactorily terminated from a deferred prosecution program. An abuser cannot enter a diversion program without the consent and recommendation of the prosecutor and the victim. Diversion occurs after conviction but before an adjuciation of guilt is entered. ARIZ. REV. STAT. §§ 13-3601, 13-3602 (Supp. 1980).

In California, deferred prosecution is available if the offense was charged as or reduced to a misdemeanor, if there has been no conviction of a violent crime within 3 years, if there has been no prior revocation of probation, and if the abuser has not previously participated in a diversion program. If the defendant is eligible for diversion, the prosecutor must inform the defendant and his attorney about the diversion program and the admission procedure. The defendant must consent to participate and waive his right to a speedy speedy trial. No admission of guilt is required. California law specifies that the abuser will be dropped from the program if convicted of another violent crime during the diversion period, or if the prosecutor finds that he is not participating in or benefiting from the program. CAL. PENAL CODE §§ 1000.6 to 1000.11 (West Supp. 1980).

Wisconsin law requires that an abuser admitted to a diversion program consent to participate, waive his right to a speedy trial, and agree that the statute of limitations will be tolled during diversion (so that prosecution may be resumed if necessary). Abusers

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participating in diversion in Wisconsin must file monthly reports with prosecutors certifying compliance with conditions imposed. WIS. STAT. ANN. § 971.37 (West Supp. 1980-1981).

In California, prosecution may be suspended for 6 to 24 months. In Wisconsin prosecution may be suspended up to 12 months.

3. A. Ganley, Ph.D. and L. Harris, Ph. D., Domestic Violence: Issues in Designing and Implementing Programs for Male Batterers (August 29, 1978) (unpublished paper presented to the American Psychological Association).

4. MIAMI STATE ATTORNEY, DOMESTIC INTERVENTION PROGRAM: ANNUAL REPORT, 13, 15; Interview with Barbara Wade, Post-Arrest Unit Supervisor, Miami State Attorney's Office, in Miami (March 17-18, 1980).

5. PRETRIAL DIVERSION, _supra_ note 1, at 7.

6. Brady v. United States, 397 U.S. 742, 748 (1970); _see_ McMann v. Richardson, 397 U.S. 759, 766 (1970).

7. _Id_.

8. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS, 27, 28 (1973).

9. _See_ PRETRIAL DIVERSION, _supra_ note 1, at 7-10.

10. Coleman v. Alabama, 399 U.S. 1 (1970).

11. Brewer v. Williams, 430 U.S. 387, 398 (1976).

12. _Id_., _quoting_ Kirby v. Illinois, 406 U.S. 682, 689 (1972).

13. Gerstein v. Pugh, 420 U.S. 103, 105 (1975).

14. _Id_. at 114.

15. _See_ Domestic Intervention Program, Miami State Attorney, Statistical Summary, Appendix B.

16. Interview with Mark Bencivengo, Director of Nexus, In Philadelphia, Pa. (July 1980).

17. The diversion statute in Michigan provides that when a batterer's arrest record is expunged following successful completion of a diversion program, a nonpublic record is kept which is "furnished to a court or police agency for the purpose of showing that a defendant in a criminal action ... has already once [participated in a diversion program]." MICH. COMP. LAWS ANN. § 769.5a(4) (West Supp. 1978-1979).

18. PRETRIAL DIVERSION, *supra* note 1, at 103, 104.

19. *Id*. at 98, note 12, *citing* New Jersey Court Rule 3:28§(c)(4) (1974).

20. MOTT-McDONALD ASSOCIATES, INC., THE REPORT FROM THE CONFERENCE ON INTERVENTION PROGRAMS FOR MEN WHO BATTER 38-39 (1980) (on file at the Center for Women Policy Studies).

21. Ganley and Harris, *supra* note 3.

22. *See* MIAMI STATE ATTORNEY, *supra* note 4, at 11-15 (1980).

23. Interview with Vicki Boyd, Ph.D., psychologist at the Group Health Cooperative of Seattle, Washington, in Seattle (Nov. 19, 1980).

24. *See* Domestic Intervention Program, Miami State Attorney, Statistical Summary, Appendix B.

25. Interview with Carolyn Howard, Director of Portland Family Violence Program, in Portland (November 16, 1980).

PART III: ASPECTS OF POLICE INTERVENTION

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The primary duty of the police in answering a domestic disturbance call following or during an incident of wife abuse is to assess the danger and protect the safety of the victim. Making arrests in family violence cases leads to more frequent prosecution. An arrest serves to protect the victim and communicates to both parties that spouse abuse is a crime. Chapter Six discusses how requirements for warrantless arrest have been or are being abolished as an important step in activating the criminal justice system to reduce family violence.

The concerns which have led to an expansion of police arrest power in domestic violence cases may be thwarted unless short-term post-arrest detention is available. Bail laws presently permit an arrested abuser to be released a few hours after his arrest, obviously decreasing the protection afforded a victim by the arrest itself. The conflict between the need for detention in spouse abuse cases and the civil liberties considerations inherent in the bail issue is discussed in Chapter Seven, Post-Arrest Detention.

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CHAPTER SIX

EXPANSION OF ARREST POWER: A KEY TO EFFECTIVE INTERVENTION

Police handling of domestic cases is fundamental to successful prosecution, because battered women who want help from the criminal justice system generally turn to the police first. Because the police act as gatekeepers to the criminal justice system, their conduct may determine whether the victim will pursue criminal charges or cooperate if charges are filed. So every aspect of police intervention has an effect on any subsequent prosecution.

From a prosecutor's point of view, however, the most important aspects of police response are that police file reports, make arrests in appropriate cases, and temporarily detain defendants who may intimidate complaining witnesses, so that conditions may be placed on their release. Police are reluctant to file reports or to take batterers into custody, because so few of the domestic cases result in prosecution that they feel their time is wasted.[1] Prosecutors who set policy favoring prosecution of spousal assaults and prohibiting dismissal of charges observe changes in police response which facilitate successful prosecution.

There are several arguments in support of a policy of more frequent arrest of batterers. An increase in the number of persons arrested for violence against their mates, parents, or children will lead to more frequent prosecution of family

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violence cases. If an arrest is made, a prosecutor can expect that a report will be sent to his office and that evidence will saved. Likewise, the prosecutor can expect cooperation from the police in obtaining a conviction.

Making an arrest places the burden on the prosecutor to initiate further action, rather than leaving the onus on the victim to find out what remedies are available to her and to seek help. She may not do so because of ignorance, fear of retaliation, or feelings of helplessness. The making of an arrest therefore increases the likelihood of victim cooperation. The International Association of Police Chiefs states that, "A policy of arrest, when the elements of the offense are present, promotes the well-being of the victim.... The officer who starts legal action may give the wife courage she needs to realistically face and correct her situation."[2]

Immediate arrest may prevent further injury. Lenore Walker, Director of the Battered Women Research Center in Denver, Colorado, reports that police are most often called during the "acute battering phase" of the abuse syndrome, during which one or more severe beatings may occur. This phase usually lasts between 2 and 24 hours.[3] A victim may be in serious danger if the police who answer a call depart, leaving both parties in the residence. This danger may not be apparent because abusers are often polite and deferential in the presence of police.

Finally, an arrest communicates to the parties that the abuser has committed a crime, that the victim has a right not to be beaten, and that the criminal justice system will take action to stop the abuse. If the police remain at the scene of a domestic disturbance for 20 minutes to talk to the couple and "cool things off," and then depart, the police leave both the victim and the abuser with a message that no crime has been committed, and that no serious consequences will follow from calling the police.

To advocate more frequent arrest of abusers is not to suggest that arrest is always appropriate. In some cases there may not be probable cause that a crime was committed. In others, an abuser who is arrested may go home and beat his wife for calling the police. Police must be trained to analyze the situation carefully before taking any action. The risk of precipitating another beating by making an arrest may be reduced by detaining the abuser overnight until a bond hearing the next morning, or by escorting the abuser elsewhere for the night. Alternatively, the police may take the victim to a shelter.

CONSTITUTIONAL LIMITS ON WARRANTLESS ARREST

The fourth amendment of the United States Constitution prohibits the issuance of a warrant for arrest unless there is probable cause to believe that a crime has been committed, and probable cause that the person arrested committed the crime alleged.[4] The Constitution has also been interpreted to require probable cause for warrantless arrests.[5]

A recent U.S. Supreme Court decision, Payton v. New York,[6] limited the power of the police to make a warrantless arrest in the home of the person arrested. The Court held that "the Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."[7] Because most domestic abuse occurs in the home of the suspect, this decision raises questions about the constitutionality of state laws expanding police power to make warrantless arrests in domestic cases.

The Payton decision invalidated two warrantless arrests in the homes of the persons arrested. In one case the police entered the apartment of a suspect by breaking the door with a crowbar. No crime was in progress in the dwelling. In the other case, a suspect was arrested in his home by police who had not obtained a warrant even though they had known his address for two months before they tried to make the arrest.

Writing for the majority, Justice Stevens stated that "we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances', that would justify a warrantless entry into the home for the purpose of either arrest or search." He also noted that "in both cases we are dealing with entries into homes made without the consent of an occupant."[8] The facts of these cases and the explicit exclusion of the relevant issues makes clear that this decision does not render the domestic abuse arrest laws unconstitutional.

Other constitutional issues relating to warrantless arrest have been litigated in lower courts. One law was challenged as violating the Equal Protection Clause of the fourteenth amendment; another was alleged to allow arrest without probable cause, in violation of the fourth amendment.

On March 27, 1980, the Supreme Court of Florida, in LeBlanc v. Florida,[9] upheld a state law allowing warrantless arrest by a police officer where:

> The officer has probable cause to believe that the person has committed a battery upon the person's spouse, and the officer finds evidence of bodily harm or the officer reasonably believes that there is danger of violence unless the person alleged to have committed the battery is arrested without delay.[10]

The Florida Supreme Court upheld the statute against a challenge that the application of the law to spouse abusers violated the Equal Protection Clause of the fourteenth amendment because it treated spouses differently from other persons. The Court held that "it is not a requirement of equal protection that every statutory classification be all-inclusive.... Rather, the statute must merely apply equally to the members of the statutory class and bear a reasonable relation to some legitimate state interest.... We find that the statute clearly satisfies this rationality test."[11]

Some laws use the language "reasonable cause" or "reasonable belief" in place of "probable cause." This language has been challenged as allowing arrest without probable cause in violation of the fourth amendment. At least one court has held, however, that such language is synonomous with "probable

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cause," and that a statute using the former language is not unconstitutional.[12]

STATE ARREST LAWS

State law may not abolish the probable cause requirement. However, within the limits imposed by the fourth amendment, police authority to arrest is defined by state law. In most states, one law dictates standards for arrest in all criminal cases. These laws generally allow warrantless arrest in cases in which an officer has probable cause to believe that a felony (most often defined as a crime punishable by more than one year in jail) has been commited, or where an officer witnesses the commission of a misdemeanor (usually an offense punishable by less than one year in jail). These standards have been widely criticized by experts on domestic violence and scholars of criminal law.

Wayne LaFave, a professor of law at the University of Illinois, for example, suggests that limits on arrest powers should be based on the need for immediate action, rather than on the felony/misdemeanor distinction.[13] The American Law Institute recommends that statutes authorizing warrantless arrest adopt the following standards:

> Authority to Arrest Without a Warrant - A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such a person has committed:
>
> a. a felony,
>
> b. a misdemeanor, and the officer has reasonable cause to believe that such person

(i) will not be apprehended unless immediately arrested, or

(ii) may cause injury to himself or others or damage to property unless immediately arrested, or

c. a misdemeanor or petty misdemeanor in the officer's presence.[14]

These recommendations for change in the state arrest laws make clear that domestic abuse cases are just one of several types of emergency situations in which warrantless arrest is necessary and appropriate.

Arrest standards based on a misdemeanor/felony distinction discourage arrest in most domestic abuse cases. Police generally view family abuse as a minor offense, especially if there has been no serious injury or if the injury is not visible. If mate abuse is treated as a misdemeanor, and the law allows warrantless arrest only in felony cases, the police may not arrest because the process of obtaining a warrant may take hours or days. Misdemeanor arrest warrants are generally issued only when a victim files a private criminal complaint; they are rarely sought by police officers who answer domestic disputes.

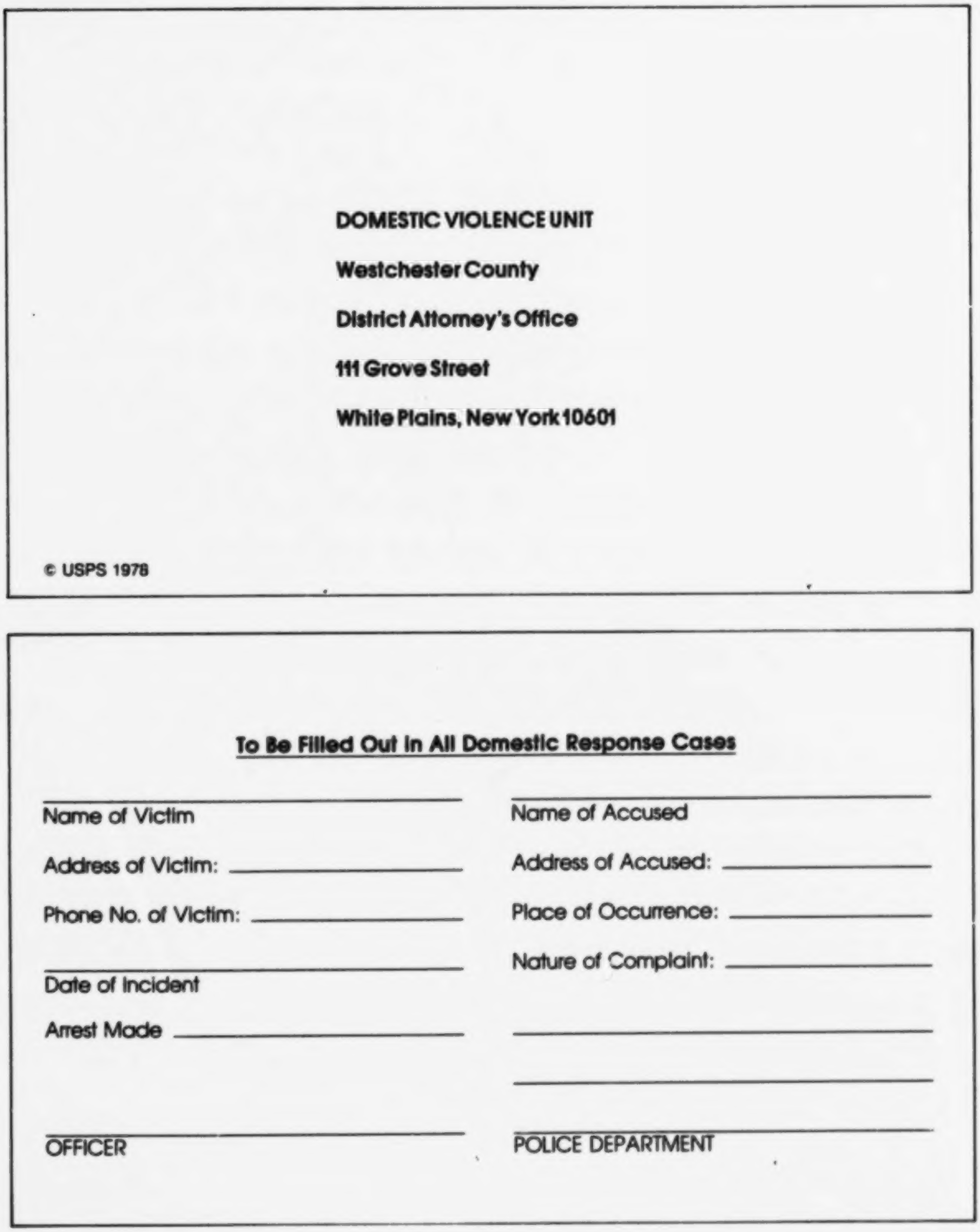
NEW WARRANTLESS ARREST LAWS

Currently, a policy that encourages arrest of abusers is reflected in the laws of 25 states which allow police to make warrantless arrests for misdemeanor offenses in domestic abuse cases and/or for violation of protection orders.[15] Abolishing the requirement that a warrant be obtained prior to arrest is an important step in activating the criminal justice system to reduce family violence.

In thirteen states, domestic abuse arrest laws allow warrantless arrest for misdemeanor offenses committed against family members.[16] Most of these allow warrantless arrest where an act of physical abuse has occurred.[17] Some, in addition, allow warrantless arrest where "there is a substantial likelihood of immediate danger of that (adult family) member being abused (emphasis added)."[18]

Many of the new laws impose other conditions that must be met before a warrantless arrest can be made. Some reflect a concern that warrantless arrests be made only in emergencies. In Minnesota and New Hampshire, the domestic abuse laws allow warrantless arrest only within a few hours of the incident of abuse. In Rhode Island, warrantless arrest is allowed within 24 hours of abuse.[19] Minnesota and Nevada preclude warrantless arrest for domestic violence unless there is physical evidence of abuse.[20]

Some states have passed laws that permit warrantless arrest whenever violence would be likely if an arrest were not made. These statutes are not specific to domestic violence cases. Illinois law, for example, allows warrantless arrest for any misdemeanor offense based on probable cause alone.[21] In Nebraska, warrantless misdemeanor arrest is allowed when the officer has witnessed the offense or if the suspect may get away, may injure another, or may destroy evidence of the



DOMESTIC VIOLENCE UNIT

Westchester County

District Attorney's Office

111 Grove Street

White Plains, New York 10601

© USPS 1978

To Be Filled Out In All Domestic Response Cases

Name of Victim ______________________

Name of Accused ______________________

Address of Victim: ______________________

Address of Accused: ______________________

Phone No. of Victim: ______________________

Place of Occurrence: ______________________

Date of Incident ______________________

Nature of Complaint: ______________________

Arrest Made ______________________

OFFICER ______________________

POLICE DEPARTMENT ______________________

POLICE REFERRAL CARD
The Westchester County police send this postcard to the District Attorney's Domestic Violence Unit for each family violence call answered.

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offense unless arrested immediately.[22]

Warrantless arrest by a police officer who has probable cause to believe that a protection order has been violated is permitted by law in twelve states.[23] The provisions allow arrest for action which could not be the basis of an independent criminal charge, such as a contact with the victim, failure to attend counseling, etc. The issuance of a protection order renders such action a misdemeanor, a felony, or contempt of court.

Before a protection order becomes effective it must be served on the abuser. A statute allowing warrantless arrest for violation of a protection order is more likely to be enforced if the law includes a provision requiring a law enforcement agency to deliver orders to abusers. If the law does not require free delivery of orders by a specific agency within a certain period of time, police or sheriffs may delay delivery or may charge for the service.

Before an abuser may be arrested for violation of a protection order, the abuser must receive a copy of the order and the police must be able to verify that an order is currently in effect. This can be done either by providing victims with certified copies of protection orders, or by setting up a procedure to enable police to verify the existence of an effective order, or both.

Some state laws require that the court deliver a copy of each protection order to the local police department. Oregon law provides for verification by requiring that a certified copy of each protection order and proof of service be kept on file in the police department.[24] Massachusetts law, in addition, requires that "law enforcement agencies shall establish procedures adequate to insure that an officer at the scene of an alleged violation may be informed of the existence and terms of such an order."[25] If protection orders are filed in a building open only during regular office hours, verification is difficult. In large cities, protection orders should be recorded on a computer system, so that radio verification can be made from anywhere in the city.

Several states have passed criminal laws making spouse abuse a separate offense. Some of these include provisions allowing warrantless arrest where a charge of spouse assault is filed. In Ohio, for example, a first offense of spouse assault is a first degree misdemeanor, and subsequent offenses may be charged as fourth degree felonies. Where a charge is filed under this statute, police may arrest without a warrant. The Ohio law allows arrest upon "the execution of a written statement by a person alleging that the alleged offender has committed the offense against the person or against a child of the person."[26]

MANDATORY ARREST

While most of the new laws expand the authority of the police to make arrests, only a few require that arrests be made when they have probable cause of spousal assault. Those that impose a mandatory duty to arrest abusers are Maine, Minnesota, North Carolina, Oregon, and Utah. They differ from the other laws in that "shall arrest" is used in place of "may arrest."[27]

The inclusion of mandatory duties in state arrest law is desirable for several reasons. It makes clear a legislative intent to increase the number of arrests made in family abuse cases. Second, it reduces police discretion to treat family violence as a trivial matter. Third, if the law prescribes a mandatory duty, the failure of the police to make an arrest where probable cause is present is a violation of the law and the basis for a lawsuit.[28] Two such lawsuits were filed in November of 1980 against police departments in Oregon by Oregon Legal Services Corporation, on behalf of two battered women.[29] A similar suit is pending in Florida, in which a battered woman who killed her husband after the police refused to arrest him is suing the police for violation of their statutory duty.[30]

Under the Oregon law, the duty to arrest is imposed only in cases in which the victim does not object. Conditioning the duty to arrest on the consent of the victim may render the provision ineffective. If a victim is asked if she objects to the making of an arrest in the presence of her abuser, she may be afraid to consent. If the wishes of the victim are to be taken into account by criminal justice officials, the victim should be consulted under circumstances where she may safely express her feelings. The primary duty of the police is to assess the danger and protect the safety of the victim. Police should not be required to act as social workers, and should be empowered to make an arrest without the victim's consent if necessary.

POLICE IMMUNITY

Most laws expanding police power to make warrantless arrests for domestic abuse include provisions protecting the police from civil liability from any action taken in a "good faith" effort to enforce the law.[31] This is a legislative response to a frequently articulated fear of suits for false arrest. These provisions do not prohibit lawsuits ordering the police to enforce the law, or lawsuits for violation of federal civil rights laws, but only protect police from personal injury suits under state law for money damages.

CONCLUSION

Recent changes in legislation are not yet fully reflected in police practices; arrest of batterers is still quite rare. To encourage full enforcement of the law, training programs designed to make police aware of their expanded powers must be implemented.

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1. This was the general consensus of a group of 30 police officers who were members of a class on domestic violence at the FBI National Academy, July 15, 1981.

2. International Association of Chiefs of Police, Wife Beating: Training Key No. 245 (IACP 1976).

3. L. WALKER, THE BATTERED WOMAN 64 (1979).

4. "Probable cause" means that the arresting officer must have "reasonably trustworthy information" in light of any "facts and circumstances" that would lead a reasonably cautious person to believe that an offense had been or was being committed. Draper v. United States, 358 U.S. 307, 318 (1959).

5. Wong Sun v. United States, 371 U.S. 471 479-480 (1963).

6. 100 S. Ct. 1371 (1980).

7. Id.

8. Id.

9. 382 So. 2d 299 (1980).

10. FLA. STAT. ANN. §901.15 (6) (West Supp. 1980).

11. Id.

12. City of Columbus v. Herrell, 247 N.E. 2d. 770 (Ohio Ct. App. 1969).

13. W. LA FAVE, THE DECISION TO TAKE A SUSPECT INTO CUSTODY 231-33 (1965).

14. AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 13 (1975).

15. These are Alaska, Florida, Georgia, Hawaii, Idaho, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah, and Washington.

16. These include, Alaska, Florida, Hawaii, Kentucky, Maine, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Oregon, and Washington.

17. E.g., MINN. STAT. § 629.341 (1945).

18. E.g., UTAH CODE ANN. §§30-6-8(2), 77-13-3(3) (1978 and Supp. 1979).

19. MINN. STAT. ANN. §629.341 (Supp. 1980) (within four hours); N.H. REV. STAT. ANN. §549:10-1 (Supp. 1979) (within six hours); R.I. GEN. LAWS §11-5-9 (Supp. 1980).

20. MINN. STAT. ANN. §629.341 (Supp. 1980); NEV. REV. STAT. §171-124(1)(f) (1979).

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21. ILL. REV. STAT. ch. 38, §107-2 (1970).

22. NEB. REV. STAT. ch. 29, §404.02 (1943).

23. These are Arizona, Maine, Massachusetts, Michigan, Missouri, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, and Utah.

24. OR. REV. STAT. §133.310(3) (1979 Replacement Part).

25. MASS. GEN. LAWS ch. 208, §34C (West Supp. 1980).

26. OHIO REV. CODE §2935.03 (B) (Supp 1979).

27. *See* Clark v. Carney, 42 N.E. 2d 938-939 (1942), State v. Marshall, 105 N.E. 2d 981 (Ohio Mun. Ct. 1952). At common law, the police in many cases were obligated to make arrests. Case law has interpreted some statutes which use discretionary language to impose a mandatory duty. State v. Grunewald, 300 N.W. 206,207 (Minn. 1941) (felonies), Dixon v. State 132 So. 684, 686 (Fla. 1931).

28. *See* Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RIGHTS LAW REPORTER 7 (1978).

29. *See* "Two Battered Wives Sue Police," OREGON JOURNAL p. 3 (November 13, 1980).

30. Plaintiffs Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Buckhannan v. Miami, No. 80-14830 (Cir. Ct. Fla. March 30, 1981) (on file at the Center for Women Policy Studies).

31. *E.g.*, N.C. GEN. STAT. §14-134.3(19) (1978 & Supp. 1979); OR. REV. STAT. §133.315 (1979-1980).

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CHAPTER SEVEN

POST-ARREST DETENTION

A policy of encouraging arrest when probable cause is present protects the victim, gives the abuser time to cool off, encourages prosecutors to pursue domestic violence cases more aggressively, and communicates to both parties that spouse abuse is a crime. With such a policy, there is often a concomitant need for temporary detention of arrested abusers. If normal arrest and bail procedures are followed, whether for a felony or misdemeanor charge, the abuser may be released on bail within a few hours after his arrest. This makes protection of the victim as well as prosecution of the abuser more difficult. Immediate post-arrest release enables the abuser to return to the victim, and through either actual or threatened violence, dissuade her from participating in prosecution.

To prevent this, police may elect not to use the 'jail house bail' laws in domestic violence cases. Instead, a suspect may be held until bail can be set by a judge, and under appropriate circumstances, other conditions can be placed on his release which will protect the victim from further abuse (see Chapter Four, Conditions on Pretrial Release). Short-term detention is frequently used in Miami, Florida, in many cases which subsequently enter the Domestic Intervention Program (DIP). DIP staff report that this delay in releasing the

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defendant, usually only overnight, helps protect the victim, and impresses upon the abuser the criminality of his act.

THE CONSTITUTIONAL RIGHT TO BAIL

The appropriateness of pretrial detention in spouse abuse cases is bound by constitutional limits on post-arrest detention. Primary issues are what the constitutional right to bail is comprised of and whether federal constitutional standards are applicable to state prosecution. The permissable length of any pretrial detention, permissable conditions of detention, and the extent of the discretionary powers of the judge in setting bail are also important. While some of these matters have been addressed by the U.S. Supreme Court, many have not. Since there is no definitive constitutional rule against which to measure the appropriateness of pretrial detention in spouse abuse cases, lower court decisions must be relied upon for guidance.

The "excessive bail" clause of the eighth amendment of the United States Constitution guarantees that "excessive bail will not be required" from those detained on criminal charges. Though the Supreme Court has never ruled that this clause applies to the states through the fourteenth amendment, circuit court and district court cases have held that it applies to state as well as to federal prosecutions.[1] The Supreme Court in Stack v. Boyle[2] held that bail must be set only for the purpose of assuring that the accused will be present at trial, and will submit to sentence if found guilty. The trial judge has some discretion in setting the amount of bail, but the standards used to determine amount must be related to the defendant's appearance at trial.[3]

Factors which a judge should consider in setting bail include the nature and circumstances of the offense, the weight of the evidence against the accused, and the financial status and the character of the accused.[4] The defendant has a due process right to have bail set at a hearing before a judge or magistrate, and to have bail determined based on the circumstances of his case. This right may be waived, but a scheme which relies solely on schedules that set bail at a fixed amount for specific crimes does not meet this due process requirement.[5]

In general, the cases hold that bail must be set only as high as is necessary to ensure the defendant's appearance at trial, and not higher as a means of detaining the suspect prior to trial. In most cases, defendants should be released prior to trial to preserve the presumption of innocence, to prevent punishment prior to conviction, and to allow the accused to participate in the preparation of his defense.

LIMITS ON THE CONSTITUTIONAL RIGHT TO BAIL

Although the right to have bail set is considered to be fundamental, it has not been held to be absolute.[6] While the right to bail must 'generally exist,' this has not been interpreted to mean that a bail must be available for every offense.[7] States may provide by statute that bail can be granted in some cases and denied in others. In addition, state law may give the trial courts the discretion to grant or deny bail and to fix the amount.[8]

Most states have made capital offenses and other serious offenses nonbailable. In addition to legislated exceptions, some cases have held that bail may be denied in individual cases if, regardless of the amount set, the accused is unlikely to be present at trial;[9] if denial of bail appears necessary to prevent interference with the process of investigation or the orderliness of the trial;[10] if it is necessary to protect a witness;[11] or if the judge feels that release of the accused will endanger the community.[12] These rules vary from state. In some cases, these laws have been used to detain batterers. In Nail v. Slayton,[13] for example, the court, relying on Virginia statute which allows denial of bail based on a determination that a suspect is dangerous,[14] refused to set bail for a defendant accused of killing his wife.

The power of a state court to detain batterers before trial, and the maximum permissible length of such detention depends largely on state law and on the state constitution. Even in cases in which the court has the power to withhold bail, that power is not often exercised except in the most severe cases. The cases upholding a judge's right to deny bail generally involve very serious crimes, such as first degree murder. They also frequently result from the denial of bail during an appeal of a criminal conviction.[15]

As with the right to have bail set, the right to have bail set at a reasonable amount is also qualified. The prohibition on excessive bail has not been interpreted to mean that bail laws must necessarily be administered so that every defendant can always make bail.[16] Indigent defendants are often held until trial because they cannot secure sufficient funds. This practice is rarely challenged successfully. Decisions finding pretrial detention of indigents unconstitutional usually focus instead on the conditions of confinement. Courts frequently find that conditions under which pretrial detainees are held are unacceptable, and order prisons to improve conditions for pretrial detainees.[17]

STATE BAIL LAWS

The concerns which have led to expansion of police arrest power in domestic violence cases may be thwarted unless short-term post-arrest detention is available. Arrest and overnight detention guarantee short-term protection of the victim. Delaying release until the abuser can be brought before a judge ensures an opportunity for a court assessment of the risk of witness intimidation and an opportunity for a judge to place appropriate restriction on the abuser. Also, the short period that the abuser spends in jail is a powerful message that his violent behavior toward his mate is criminal. This may deter future abusive behavior, and may increase the abuser's willingness to participate in a counseling program.

Most states have laws which allow persons arrested on misdemeanor charges to gain immediate release by posting a small bond. The amount varies from state to state, and often varies with the charge. Some state laws, however, permit arresting officers to deny jail house bail to an individual who would pose a threat to the community if immediately released. In such cases a suspect may be detained until he can be brought before a judge to have bail set. This short detention may provide valuable protection for victims of spouse abuse.

Short-term detention in misdemeanor cases is particularly important in the fourteen states which have laws permitting the police to make warrantless arrests in misdemeanor spouse abuse cases even if the abuse was not committed in the presence of the police.[18] It should be noted that in spouse abuse cases, severe beatings often result only in a misdemeanor charge if no weapon was used.

Procedures for setting bail in felony and misdemeanor cases are similar except that jail house bail is often unavailable in felony cases. Persons arrested on felony charges are usually held until they can be brought before a judge to have bail set. Since the majority of spouse assaults occur at night, on weekends, or on holidays, when courts are not in session, batterers arrested on felony charges are usually held at least overnight. The length of time a suspect may be held before bail is set varies widely; Florida law limits this period to 24 hours,[19] while Illinois permits pre-bail detention up to 72 hours.[20] Wisconsin law allows an accused to be held for a 'reasonable' amount of time before being brought before a judge.[21] Reasonableness is assessed based on the circumstances of each case;[22] periods as long as three days have been found to be reasonable.[23]

Some state laws allow longer periods of pretrial incarceration than those just discussed. Under the Virginia law, for example, an individual may be denied bail where "there is probable cause to believe that (1) he will not appear, or (2) his liberty constitute an unreasonable danger to himself or the public."[24]

A preventive detention statute in Washington, D.C. provides that an individual may be held without bail when necessary to ensure his appearance at trial.[25] Whether dangerousness is an appropriate reason for denying bail under this law is not yet settled.[26] Attempts to enact other similar statutes have been vigorously opposed because of civil liberty concerns. These statutes are usually only used to detain people accused of serious crimes such as first degree murder or armed robbery; their application to spouse abuse cases may be very limited.

STATE BAIL LAWS ON SPOUSE ABUSE

The conflict between the need for detention in spouse abuse cases and the civil liberties considerations inherent in the bail issue may best be resolved by enactment of a bail law specifically for spouse abuse cases. Minnesota and North Carolina statutes are useful models. The Minnesota law allows the arresting officer in a misdemeanor spouse abuse case to deny the accused immediate release if he feels that "detention is necessary to prevent bodily harm to the arrested person or to another."[27] If an individual is detained under this law, he must be brought before a judge within 24 hours of his arrest. The judge may then impose conditions on release to protect a particular individual or the public.[28] The North Carolina law allows the judge to "retain the defendant in custody for a reasonable period of time while determining the conditions of pretrial release."[29] The listed conditions which may be imposed are designed to protect the victim and other family members from further abuse or harassment.[30]

A statute tailored to family abuse cases will protect victims of abuse without promoting widespread detention. Short-term detention of spouse abusers is arguably more necessary than detention of persons who commit violent crimes against strangers, because injury to or interference with the testimony of a complaining witness is more likely if the parties to a criminal prosecution are or were in an intimate relationship.

Bail laws should make short-term detention available for criminal charges arising out of an incident of domestic abuse. They should specify the maximum duration of permissable detention, and require a prompt hearing before a judge on whether the defendant should be detained. The law should also specify conditions which may be imposed on the release of the abuser, procedures for informing police of orders issued, and penalties for violation.[31] A specific and narrowly drafted statute may help to prevent further abuse without unnecessary infringement of the liberty of criminal defendants.

A MODEL STATUTE

A more limited alternative to Virginia's bail law is a pending amendment to Wisconsin's state constitution. It would limit the circumstances under which an accused could be held without bail, but would allow the judge wide discretion in imposing conditions designed to assure appearance at trial and to protect the community and potential witnesses. As drafted, it states:

> The legislature may authorize, by law, circuit courts to deny release for a limited period of time to a person accused of a crime involving serious bodily harm to another, provided the law is specific, limited and reasonable, and requires a finding by the court based on clear and convincing evidence presented at a hearing that the accused committed the crime, and a finding by the court that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent intimidation of witnesses.[32]

Though the existing bail laws may be used to alleviate some of the problems associated with the arrest and prosecution of spouse abusers, they were not designed for this purpose. The intent of the laws is to facilitate the release of eligible individuals, not to encourage detention. Although it is common practice, the propriety of using these laws as a detention device instead of as a release mechanism is questionable. New bail laws should be drafted carefully and narrowly, to allow protection of victims in serious danger while minimizing the possibility of inappropriate application.

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1. Pilkinton v. Circuit Court of Howell County Missouri, 324 F. 2d 45, 46 (Oth Cir. 1963), Turco v. Maryland, 324 F. Supp. 61, 63 (D. Md. 1971).

2. 324 U.S. 1 (1951).

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3. *Id.* at 5; Pugh v. Rainwater, 557 F.2d 1189, 1192 (5th Cir. 1977).

4. Stack v. Boyle, 342 U.S. at 5.

5. Ackies v. Purdy, 322 F. Supp. 38, 41 (S.D. Fla. 1970).

6. Mastrian v. Hedman, 326 F.2d 708, 710 (8th Cir. 1964), Wansley v. Wilkerson, 263 F. Supp. 54, 57 (W.D. Vir. 1967).

7. Mastrian v. Hedman, 326 F.2d at 710, Nail v. Slayton, 353 F. Supp. 1013, 1019 (W.D. Vir. 1972).

8. Wansley v. Wilkerson, 263 F. Supp. at 57, U.S. *ex. rel.* Smith v. Prasse, 277 F. Supp. 391, 392 (1968).

9. United States v. Galante, 308 F.2d 63 (2d Cir. 1962).

10. Mastrain v. Hedman, 326 F.2d at 712.

11. United States v. Gilbert, 425 F.2d 490, 492 (D.C. Cir. 1969), United States v. Carbo, 288 F.2d 282, 285 (9th Cir. 1961), *cert denied* 369 U.S. 868 (1962).

12. Nail v. Slayton, 353 F. Supp. at 1019, United States v. Carbo, 288 F.2d at 285 (pretrial bail revoked in conspiracy, extortion case).

13. 353 F. Supp. 1013.

14. VA. CODE § 19.2-120 (1950).

15. Rehman v. California, 85 S. Ct. 8, 9 (1964).

16. Mastrian v. Hedman, 326 F.2d at 710.

17. Pugh v. Rainwater, 557 F.2d at 1191-92.

18. *See* Chapter Six, Expansion of Arrest Power: A Key to Effective Intervention, *supra*.

19. FLA. STAT. § 901.15 (West Supp. 1980).

20. ILL. ANN. STAT. ch. 38, § 109-1 (Smith-Hurd 1980).

21. WIS. STAT. ANN. § 970.01 (1971).

22. Phillips v. State, 29 Wis. 2d 521, 139 N.W.2d 41 (1966).

23. Kain v. State, 48 Wis. 2d 212, 179 N.W.2d 777 (1970), State v. Hunt, 53 Wis.2d 734, 193 N.W.2d 858 (1972).

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24. VA. CODE § 19.2-120 (1950).

25. D.C. CODE ANN. § 1322 (1970).

26. Campbell v. McGruder, 580 F.2d 521, 528 (D.C. Cir. 1978).

27. MINN. STAT. § 629.72 (Supp. 1981).

28. Id.

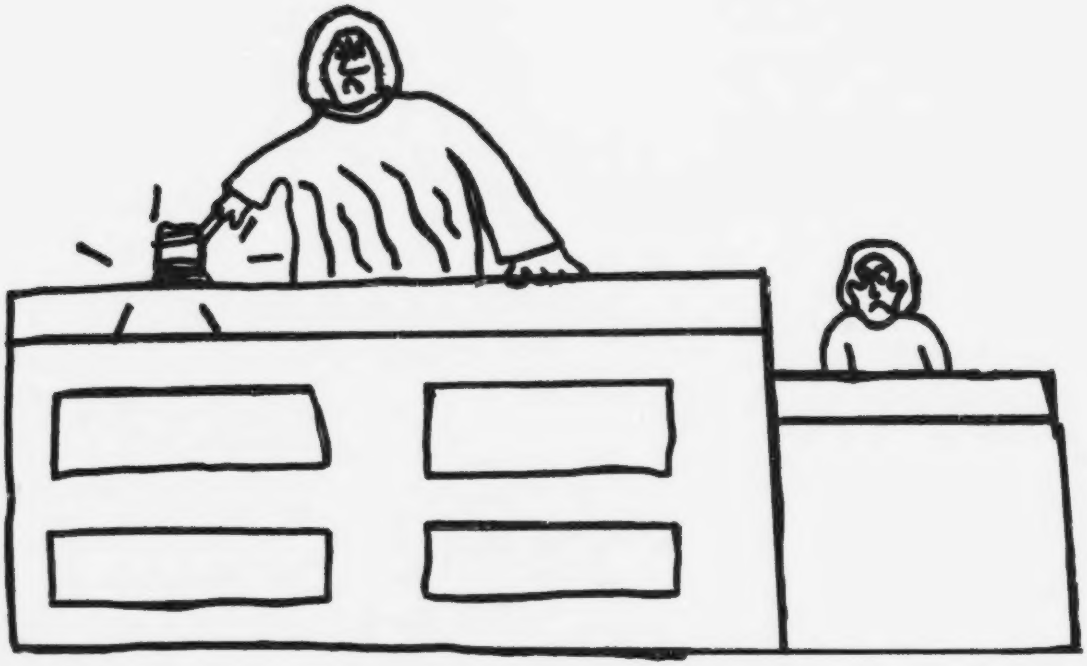
29. N.C. GEN. STAT. § 5A-534 (Replacement 1969).

30. Id.

31. See Chapter Four, Conditions on Pretrial Release, supra.

32. Proposed amendment to the Wisconsin Constitution (on file at the Center for Women Policy Studies).

RECOMMENDATIONS



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RECOMMENDATIONS

Violence in families continues partly because it is ignored or tacitly accepted by the institutions from which battered women seek help. By taking a firm stand that battering is a crime which will be punished, prosecutors can provide victims with an enforceable right not to be beaten, and communicate to abusers that family violence will no longer be treated as a private matter. Also, by prosecuting spouse abuse cases, prosecutors may influence other criminal justice and social service agencies which still treat wifebeating as a characteristic behavior of the "multiproblem family" and fail to respond in a useful way.

The experience of prosecutors who have established programs or units to handle battering cases suggests that these cases can be prosecuted. The relative uniformity in their experience that certain procedures reduce case attrition and increase conviction rates forms a basis for the following recommendations. While further empirical study is needed to determine the effectiveness of various procedures in preventing witness intimidation or in preventing subsequent violence, the practical experience of prosecutors in Seattle, Westchester, Santa Barbara, and Miami, may guide others who wish to take initiatives in prosecuting crimes between intimates.

- To reduce case attrition, prosecutors should adopt a policy that once charges have been filed in spouse abuse cases, victims' requests for dismissal will be denied. Battering should be treated as a crime against the state.

- To make a no-drop policy effective, victim advocates must be placed in the prosecutor's office to provide battered women with information about the criminal process, to maintain contact while charges are pending, to see that victims obtain adequate protection from intimidation, and to field calls from those who wish to drop charges. This assistance will greatly reduce case attrition. If funding for new staff positions is unavailable, prosecutors should approach advocates who work in shelters or crisis centers about coordinating these activities.

- Charges should be filed in spouse abuse cases based on the sufficiency of available evidence, regardless of whether the parties are still married or living together.

- Prosecutors should relieve battered women of responsibility for filing charges by signing complaints rather than asking victims to sign, and by sending subpoenas to victims prior to trial. This deprives the batterer of his power to manipulate the criminal justice system by intimidating the victim.

- To prevent intimidation of battered women who become complaining witnesses, prosecutors should request that the pretrial release of suspected batterers be conditioned on a no-contact order. This order should specify, in writing, that the defendant vacate a shared residence, that he avoid personal, telephone, or written contact with the victim, that he not assault or harass her, and that visitation with children shall be at specified times in the presence of a third party. The defendant, the victim, and the police should receive copies of the order.

- Where violence has been serious and chronic, prosecutors may have no choice but to recommend incarceration. In less serious cases, sentencing recommendations should be based at least in part on the goals of the victim in making a complaint. In many cases this will lead to a recommendation of probation or a suspended jail sentence conditioned on participation in counseling.

- Post-charge diversion may be used in cases where the abuser has no prior criminal record. A diversion program should include intensive treatment focused

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on the violence. If possible, treatment should be initiated within a day of the beating which formed the basis for the charge. Diversion should be conditioned on the victim's approval; if there is any abuse during diversion, prosecution should be resumed and jail recommended.

- Prosecutors should work with mental health agencies to make training on treating men who batter available to therapist. Sentencing recommendations may then request that defendants in domestic cases be ordered into treatment focused on their violent behavior. Batterers ordered into counseling should be closely tracked by a bail agency, a probation department, or if prosecution is deferred, by a prosecutor's office.

- Police should arrest batterers whenever probable cause and statutory requirements are met, and they should detain persons arrested for domestic assault overnight if the victim would be endangered by the defendant's immediate release, or if she was seriously injured and remains in a common residence. Police should file reports on spouse abuse cases whether or not an arrest is made. The report will guide the police in responding to subsequent calls, and will be available for use as evidence if the prosecutor or the victim takes legal action to prevent subsequent abuse.

- Staff in the prosecutor's office should identify spouse abuse cases by reviewing police reports and should contact victims by telephone or letter to inform them of the option of filing criminal charges.

- Prosecutors may prevent subsequent abuse in spouse abuse cases in which no charges are filed by sending warning letters to batterers or by meeting with batterers to inform them of the criminality of violent assault and the likely consequences of subsequent violence.

Implementation of changes in prosecutorial policy and practice may be slowed by a variety of political, fiscal, and bureaucratic obstacles. When the programs described in the preceding chapters, sought to improve access to criminal court for battered women, all encountered objections from chief prosecutors, resistance to change from judges, or problems in

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persuading police to file reports more frequently. Overcoming or circumventing these problems is the first and most difficult step in changing prosecutorial policy on domestic violence cases.

Most of the programs discussed had federal grants which paid the salaries of staff seeking to improve criminal justice response to spouse abuse. With the loss of the Law Enforcement Assistance Administration, and other federal sources of funding such grants may be scarce. However, some of the changes suggested can be made without special funding, through a change of policy or reallocation of existing resources. Even in the absence of supplementary funding for an elaborate program, prosecutors who make clear to their communities that battering is a law enforcement problem and that wife-beaters will be treated as criminals can play a major role in stopping domestic violence.

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APPENDICES

Appendix A: Domestic Violence Prosecution Programs

Appendix B: Miami State Attorney's Office Domestic Intervention Program, Post-Arrest Unit: Statistical Summary

Appendix C: Battered Women's Project, Seattle City Attorney's Office: Statistical Summary

Appendix D: Domestic Violence Unit, Westchester County District Attorney: Statistical Summary

Appendix E: Filing Guidelines (King County Prosecuting Attorney's Office)

Appendix F: Victim Information Sheets (Santa Barbara, California)

Appendix G: Victim Notice of Criminal Protection Order Statute (Office of the Prosecuting Attorney, Seattle, Washington)

Appendix H: Domestic Violence Disposition Guidelines Used by the Los Angeles City Attorney

Appendix I: Diversion Petition and Order (Santa Barbara District Attorney's Office)

Appendix J: Termination of Diversion Form (Santa Barbara District Attorney's Office)

Appendix K: Petition for Expedited Prosecution (Santa Barbara District Attorney's Office)

Appendix L: Orders Imposing Conditions on Release in Lieu of or in Addition to Bail and a Contempt Motion (Santa Barbara District Attorney's Office)

Appendix A: Domestic Violence Prosecution Programs

DOMESTIC VIOLENCE PROSECUTION PROGRAMS

Below is an address list of the domestic violence programs discussed at length in this report.

CLEVELAND, OHIO
Family Violence Program
Justice Center
1215 W. 3rd St.
Cleveland, Ohio 44113
(216) 623-7343
Contact: Grace Kilbane,
Bill Schwegler

LOS ANGELES, CALIFORNIA
Domestic Violence Unit
Office of the City Attorney
City Hall East
Los Angeles, California 90012
(213) 485-6292
Contact: Susan Kaplan

MIAMI, FLORIDA
Domestic Intervention Program
State Attorney's Office
1351 N.W. 12th St.
Miami, Florida 33125
(305) 547-5482

PHILADELPHIA, PENNSYLVANIA
Domestic Abuse Unit
District Attorney's Office
2300 Centre Square West, Room 170
Philadelphia, Pennsylvania 19102
(215) 686-8172

SANTA BARBARA, CALIFORNIA
Family Violence Program
6589 Hollister Avenue
Goleta, California 93107
(805) 964-2606

SEATTLE, WASHINGTON
Battered Women's Project
City of Seattle, Law Department
Municipal Building
Seattle, Washington 98104
(206) 625-2606
Contact: Sally Buckley

WESTCHESTER COUNTY, NEW YORK
Domestic Violence Unit
Westchester County District
Attorney's Office
111 Grove St.
White Plains, New York 10601
(914) 682-2944
Contact: Jeanine Pirro

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Appendix B: Miami State Attorney's Office Domestic Intervention Program, Post-Arrest Unit: Statistical Summary

STATISTICAL SUMMARY
MIAMI STATE ATTORNEY'S OFFICE DOMESTIC INTERVENTION PROGRAM—POST-ARREST UNIT

The following tables contain statistics on cases handled by a model spouse abuse diversion project in Miami, Florida. This data is drawn from the project's annual reports for 1979 and 1980.

Table 1: Caseload

	1979 # of cases	1980 # of cases
Cases Interviewed for Diversion Program	280	223
Cases Accepted into Diversion Program	169	176
Cases Closed by Diversion Program	64	196*
Cases Remaining Active at End of Year	105	85

*Cases closed in 1980 exceed cases accepted in 1980; some cases closed during 1980 were cases which remained active at the end of 1979.

Table 2: Agencies Referring Cases to Diversion Program*

	1979 N** = 169		1980 N = 223	
	# of cases	% of cases	# of cases	% of cases
Jail interview	118	70%	85	38%
Court	17	10%	77	35%
Assistant State Attorney	16	9%	33	15%
Other Referral Sources	22	13%	28	13%

*1979 data is based on the number of defendants (169) who were accepted into the diversion program that year. 1980 data is based on the number of defendants (223) who were interviewed by the program for diversion; it includes cases (47) that were rejected by the program as ineligible for diversion. Therefore, caution should be used in comparing this data.

**"N" represents the number of cases from which percentages are computed. In a few of the 1979 cases, more than one agency referred the same defendant to the diversion program; in 1980, the program received only one referral for each defendant.

Table 3: Charges Against Defendants Referred to Diversion Program*

	1979		1980	
	# of defendants	% of defendants**	# of defendants	% of defendants**
Aggravated Assault	43	25%	67	30%
Aggravated Battery	55	33%	48	22%
Battery	28	17%	35	16%
Assault & Battery	6	4%	13	6%
Assault	1	1%	11	5%
Burglary	11	7%	12	5%
Other (Child Abuse, Battery of a Police Officer, etc.)	25	15%	37	17%
Total	169	100%	223	100%

*1979 data is based on the number of defendants (169) who were accepted into the diversion program that year. 1980 data is based on the number of defendants (223) who were interviewed by the program for diversion; it includes cases (47) that were rejected by the program as ineligible for diversion. Therefore, caution should be used in comparing this data.

**Detail may not add to100 percent because of rounding.

Table 4: Services Provided to Participants in Diversion Program*

	1979 N** = 169		1980 N = 196	
	# of clients	% of clients	# of clients	% of clients
In-Program Counseling	143	85%	185	94%
Alcohol or Drug Abuse Counseling (Referral)	30	18%	7	4%
Family Therapy Program (Referral)	19	11%	41	21%
Other Referrals (Legal Services, Housing, Welfare, Child Abuse Program, etc.)	14	8%	39	20%

*1979 data is based on the number of cases (169) accepted into the diversion program. 1980 data is based on the number of cases (196) closed by the diversion program during that year. Therefore, caution should be used in comparing this data.

**"N" represents the number of clients from which percentages are computed. Some clients received multiple services in both 1979 and 1980.

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Table 5: Outcome of Cases Closed by Diversion Program

	1979		1980	
	# of closed cases	% of closed cases**	# of closed cases	% of closed cases**
Successful Completion of Diversion Program	43	67%	153	78%
Unsuccessful Termination from Diversion Program	12	19%	34	17%
a. Failure to Follow Rules and Regulations	8	12%	27	14%
b. Rearrest Due to Recurrence of Violence	4	6%	7	4%
Voluntary Withdrawal by Defendant	8	12%	4	2%
Technical Termination (Victim Dropped Charges and Other)	1	2%	5	3%
Total (Closed Cases)	64	100%	196	100%

**Detail may not add to 100% because of rounding.

Table 6: Duration of Counseling Services to Batterers in Program*

	1979		1980	
	# of closed cases	% of closed cases	# of closed cases	% of closed cases
Less than One Month	5	8%	7	4%
One to Three Months	16	25%	21	11%
Three to Six Months	27	42%	60	31%
Six to Nine Months	15	23%	48	25%
Over Nine Months	1	1%	56	29%
Total (Closed Cases)	64	100%	192**	100%

*Data is based on the number of cases closed by the diversion program.

**Total for 1980 does not include 4 cases in which defendants voluntarily withdrew from the program.

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Appendix C: Battered Women's Project Seattle City Attorney's Office: Statistical Summary

STATISTICAL SUMMARY
BATTERED WOMEN'S PROJECT SEATTLE CITY ATTORNEY'S OFFICE

The following tables contain statistics on the misdemeanor cases handled by a model spouse abuse prosecution program in Seattle, Washington. This summary is drawn from a report entitled "Statistics Summary" by Sharon Euster, a project staff member. Collection of data such as that presented here can help to establish a need for special attention to domestic violence cases, or once a program is established, can provide empirical information about what has been accomplished.

Table 1: Screening Outcome*

	July 1, 1978 to June 30, 1979		July 1, 1979 to June 30, 1980	
	# of closed cases	% of closed cases**	# of closed cases	% of closed cases**
Charges Filed	488	49%	628	39%
a. After Arrest	295	29%	333	20%
b. After Project Contacted Victim	193	19%	295	18%
No Charges Filed	516	51%	998	61%
a. Unable to Contact Victim	207	21%	516	32%
b. No Fileable Offense	56	6%	94	6%
c. Victim Elected Not to Prosecute	217	22%	357	22%
d. Referred to Other Legal Agency	36	4%	31	2%
Total (Closed Cases)	1004	100%	1626	100%

*Data is based on the number of cases closed by the prosecution program.

**Detail may not add to 100% because of rounding.

Table 2: Disposition of Cases Charged

	July 1, 1978 to June 30, 1979		July 1, 1979 to June 30, 1980	
	# of charges	% of charges	# of charges	% of charges
Convictions & Guilty Pleas	279	57%	359	57%
Acquittals	209	43%	269	43%
Total (Charges Filed)	488	100%	628	100%

Table 3: Relationship Between Victim Cooperation and Disposition of Cases

	July 1, 1978 to June 30, 1979		July 1, 1979 to June 30, 1980	
	# of charges	% of charges*	# of charges	% of charges*
Victim Cooperates	266	56%	330	53%
a. Conviction or Guilty Plea	221	45%	274	44%
b. Acquittal	45	9%	56	9%
Victim Does Not Cooperate	222	45%	298	47%
a. Conviction or Guilty Plea	58	12%	85	14%
b. Acquittal	164	34%	213	34%
Total (Charges Filed)	488	100%	628	100%

*Detail may not add 100% because of rounding.

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Table 4: Sentences for Defendants Who Plead Guilty or Were Convicted

	July 1, 1978 to June 30, 1979 N* = 279		July 1, 1979 to June 30, 1980 N = 359	
	# of cases	% of cases	# of cases	% of cases
Jail Time to be Served**	52	19%	71	20%
Jail Time Suspended	146	52%	201	56%
Sentence Deferred	89	32%	118	33%
Alcohol Counseling	65	23%	66	18%
Batterers' Counseling	54	19%	68	19%
Other Counseling	18	6%	31	9%
Mental Evaluation	34	12%	13	4%
Mental Commitment	2	1%	2	1%
Restitution, Court Costs, or Fine	95	34%	148	41%

*"N" represents the number of cases from which percentages are computed. Sentencing for some of the defendants included more than one of the penalties listed above.

**The average number of days ordered to be served was 95.3 during the first reporting period; 79.9 days during the second reporting period.

Table 5: Number of Police Reports Identified by Project on Each Batterer Reported to the City Attorney (1978 & 1979)*

	# of cases	% of cases
Batterers on Whom Only One Report Was Received	2192	83.3%
Repeaters Identified by the Project	438	16.7%
a. Batterers on Whom Two Reports Were Received	354	13.5%
b. Batterers on Whom Three Reports Were Received	66	2.5%
c. Batterers on Whom Four Reports Were Received	13	.5%
d. Batterers on Whom Five Reports Were Received	5	.2%
Total (Domestic Violence Cases Screened by City Attorney)	2630	100%

*More of the batterers may be repeaters than those identified by the project. If a police report was previously made outside the city of Seattle, or if a felony report was sent to the County Attorney, the project would have no record.

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Appendix D: Domestic Violence Unit, Westchester District Attorney: Statistical Summary

STATISTICAL SUMMARY
DOMESTIC VIOLENCE UNIT WESTCHESTER COUNTY DISTRICT ATTORNEY

Below is a statistical summary of the disposition of spouse abuse cases handled by the Domestic Violence Unit in Westchester County, New York. The unit also handles child abuse cases; data on those cases is not included in this summary. The data presented reflects activity during the first six months of 1979 and the first six months of 1980.

Table 1: Screening Outcome

	January 1979 to June 1979		January 1980 to June 1980	
	# of closed cases	% of closed cases*	# of closed cases	% of closed cases*
Charges Filed	204	36%	212	32%
No Charges Filed	361	64%	441	68%
Total (Cases Screened)	565	100%	653	100%

*Data is based on the number of cases closed by the domestic violence unit.

Table 2: Disposition of Cases Charged

	January 1979 to June 1979		January 1980 to June 1980	
	# of closed cases	% of closed cases*	# of closed cases	% of closed cases*
Convictions and Guilty Pleas	58	50%	119	50%
Acquittals	0	—	3	1%
Prosecution Deferred (Adjourned in Contemplation of Dismissal)	15	13%	32	14%
Dismissed at Request of Complainant	38	32%	59	25%
Dismissed in the Interest of Justice	1	1%	14	6%
Transferred to Family Court	5	4%	11	5%
Total (Closed Cases)	117	100%	238	100%

*Data is based on the number of cases closed by the domestic violence unit.

Table 3: Informal Action in Cases Where No Charges Were Filed

	January 1979 to June 1979		January 1980 to June 1980	
	# of cases not charged	% of cases not charged*	# of cases not charged	% of cases not charged*
Warning Letter Sent to Batterer	127	35%	112	25%
Appointment Letter Sent to Batterer	47	13%	113	28%
Total (Cases Not Charged)	361	100%	441	100%

*Data on informal action does not add up to 100% because the dispositions listed are not used in all cases where no charges were filed.

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Appendix E: Filing Guidelines (King County Prosecuting Attorney's Office)

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PROSECUTING ATTORNEY
KING COUNTY

7 July 1980

To: Filing Unit Deputies and Coordinator
Fm: Gregory P. Canova, Senior Filing Deputy
Diane H. Kahaumia, Assistant Director,
Victim Assistance Unit
Re: Filing Unit Guidelines for Processing Domestic
Violence Cases

It has been found that Domestic Violence cases brought into this Office to be filed should receive more attention and a higher level of advocacy to provide victims and witnesses immediate contact with the criminal justice system. Every case presents some degree of victim/witness problems, but for those involved in a domestic dispute there are strong emotional factors to be considered from the unwillingness to testify to denial that the crime occurred or to the victim's return to live with the defendant.

The Battering Cycle that the victim and defendant have been active participants in is cumulative violence and must be considered. One of the prime interests of this Office should be to provide an opportunity for the victim to break out of that cycle as well as to successfully prosecute the assailant. In order to aid this Office, the victim must be made aware that there are certain conditions and responsibilities on their part which must be met--testimony, no contact (no moving back in with the defendant), counseling, etc.

There are two phases in filing that are time-critical--just after the incident/pre-filing and the long period before trial--in which the victim may vacillate or hesitate to follow through. Victim/witnesses should be contacted as soon as possible to lay ground work necessary for successful prosecution and to begin answering a myriad of questions regarding the criminal justice system.

PURPOSE

The period following the incident is traumatic and it is necessary to contact the victim/witness immediately to determine whether she/he is willing or ready to accept a decision by this Office to file charges. It is important to provide support/advocacy/referral to other community agencies; to locate and maintain contact with the victim/witness, should the person move or leave the area; to discuss alternatives to prosecution, if the case is declined.

GOALS AND OBJECTIVES

To assist the deputy prosecutor by:

(1) Detecting victim/witnesses who may not be willing to testify prior to trial preparation

(2) Increasing successful prosecution

(3) Providing victim/witness with immediate contact, referral and support

(4) Evaluating cases declined by this Office and to redirect those cases to either Seattle Municipal Court or to Circuit Court, if appropriate.

CRITERIA

Cases should be referred to the Assistant Director of Victim Assistance if present/prior battering relationship exists. The Assistant Director will read statements made to the detectives and will make either a phone call or written contact or both with the victim/witness.

(1) The victim and suspect have been involved in a relationship regardless of age, sex or sexual orientation in which physical abuse may have occurred OR in which the suspect destroys property belonging to the cohabitant/family/frient OR when the suspect intimidates/harasses cohabitant/family/friends

(2) Both property damage and physical assaults on cohabitants should be referred (Malicious Mischief; Burglary; Assault; Homicide)

(3) If the woman is suspected of assaulting the male cohabitant

(4) Any property destruction that occurs between estranged parties

EXAMPLES

Ex-girlfriend tries to retrieve her property from an apartment she formerly shared with the suspect. Suspect destroys the property by setting fire to it and prevents her from entering the apartment, making threats to kill if she attempts to do so.

EXAMPLES continued

Ex-wife refuses to let ex-husband into her home. He breaks in through a window, throws her around, threatens her, then leaves taking money and jewelry.

Ex-girlfriend and her mother are followed to a restaurant while in the mother's car by the ex-boyfriend. The ex-boyfriend, in his truck, runs into the unattended parked vehicle several times causing extensive damage.

Ex-girlfriend finds ex-boyfriend and his new-girlfriend together and the ex-girlfriend assaults the new-girlfriend.

PROCESS

The Assistant Director will check reports brought in to the Filing Unit Coordinator at 1:00 p.m. each day. All cases will be reviewed at that time and information will be recorded for a separate file to be kept in V.A.U. The Assistant Director will contact the deputy assigned to review the case regarding filing status and will be available to assist in victim/witness evaluation.

DISTRICT COURTS--HANDLING THE DOMESTIC VIOLENCE COMPLAINT

I. BACKGROUND

The most frequently encountered citizen's complaint in the district courts will relate to domestic violence. Domestic violence encompasses not only the husband-wife situation, but the boyfriend-girlfriend offenses and various inter-family disputes. These complaints are frustrating to handle because they are influenced by a myriad of factors. Police officers hesitate to file the complaints because their experience indicates that the complainant will want to drop the charge the next morning. This observation is certainly based in fact.

If the complainant calls the prosecutor and asks for an appointment, then she has indicated the willingness to take one step in the direction towards prosecution. That phone call represents an initial step towards activating the criminal process--a step which may prove traumatic. That step must be met with sincerity, seriousness, professionalism and competence. The domestic violence complaint is one avenue through which citizens will form definite opinions about the legal system and how it works or does not work for them.

The following procedures are established for handling citizen's complaints utilizing the team of the legal assistant and the deputy. Domestic violence will require more time than any other type, so it is expected that the legal assistant will be the victim's primary source. Therefore, the majority of the procedures will be directed toward the legal assistant. Remember--the victim receives the maximum benefit when the team functions together.

II. THE LAW ON DOMESTIC VIOLENCE--RCW 10.99

A. Highlights

1. Philosophy of the law--violence will not be tolerated regardless of the relationship of the parties.

2. Beneficiaries under the law--cohabitants

    a. married individuals

    b. individuals living together as husband and wife now or at some time in the past

    c. individuals having a child in common (marital status irrelevant)

3. Changes in court procedure under the law--

    a. pending divorce action no longer relevant

    b. victim's address need not be disclosed through discovery process--defense attorney may obtain address, but court may order her/him not to disclose the address to the defendant

4. The "teeth" in the law--no contact order--

    a. written order entered by the court at arraignment pending trial, directing that the defendant have no contact with the victim--the defendant must sign the order in court agreeing to its terms, and he must provide a current address and phone number where he can be located

    b. no contact means no direct or indirect contact, example: letters, friends calling for defendant

    c. victim receives a copy

    d. a copy is sent to the police central computer so they have a record in case of emergency

    e. violation of a no contact order is a misdemeanor

III. APPLICATION OF THE LAW IN THE HANDLING OF A COMPLAINT

A. Origin of the Complaint

1. A police officer can issue and file a Uniform Citation with the court. In domestic violence situations, the police will often choose not to file, but refer the complainant to the deputy at the court. This is unfortunate becauses judges view police filings as more credible. Our task is to help education police officers so they will be more willing to file. Encourage police filings whenever possible.

2. An individual can consult the legal office assistant or the deputy at the nearest district court and request that the deputy file charges. If the deputy authorizes the complaint, it may be signed by the individual or the deputy and filed with the court.

3. Cases arising in a municipality will be referred to the city attorney.

B. The Initial Call

1. This step is a most difficult one for the victim--remember this as you handle the call.

2. Expect that the victim will be frightened, angry, and bewildered--the perpetrator of the violence is usually a loved one, either presently or in the past.

3. The victim wants information, reassurance and a sounding board--be careful not to be judgmental.

4. Listen to the facts and suggest that she come in to see you at the office--it's a good idea to get her in as soon as possible for two reasons: one, to see if there are any physical signs of abuse--may want to get an officer to take some pictures; two, its important to get her to take the big step while she is still angry.

5. Set up a time on the same day as the call--this communicates that you feel her complaint is top priority. Suggest that she bring a friend with her for support if she so desires.

6. Also tell her that if she decides not to come in, please call as you would like to know whether to keep that time blocked out. This allows you at least one more chance to urge prosecution.

C. The Interview

1. Don't keep the victim waiting--treat the domestic violence victim as you would treat a rape victim--both have been through a traumatic experience which deserves sincere attention.

2. Use an office where there will be no interruptions. Ask the receptionist to hold all calls--do this while the victim is there. This lets her know that she is taking top priority.

3. Be sympathetic and supportive. Indicate that you're glad she decided to call and come in. Also, communicate to her that you understand how traumatic the experience has been and you're here to answer questions and take whatever action is appropriate. Give her information on Battered Women's resources. Call the Victim's Assistance Unit at our office and have them send you information.

4. Take the facts. Listen and then complete the citizen's affidavit yourself. This provides the maximum accuracy and relieves the victim of the task of having to go through it all again in black and white. This may be overly optimistic in view of the limited time available. Assess the situation and determine if the victim can complete the affidavit herself.

5. Get the name, addresses and phone numbers of all witnesses. Also, determine whether or not the police were called. If so, get any information which she might have about the officer, police agency, etc. You will want to call and request a copy of the report. You can usually obtain this by providing the defendant's name.

6. Explain, explain, explain. Read to her the information on the affidavit. Stress that it is a serious matter to file criminal charges. Also, stress that she is not filing charges--she is merely filling out an affidavit. The deputy will review the facts and determine if the facts will support a criminal charge. Once she decides to file, the State of Washington is the charging authority. This means that if she and her husband make up, she can't simply call in and ask to dismiss charges. Tell her that the victim calls the shots as far as the actual trial goes, but the dismissal of charges will be carefully reviewed. Evaluate the likelihood that the victim will follow through and communicate that to the deputy.

D. The Filing Decision

1. Once the affidavit is completed, the deputy will review the facts to determine if the case is ready for filing. There are three possible avenues.

   a. The deputy should file when the victim provides a statement and there is some corroboration--however slight. Corrobation may be in the form of a witness to the offense, the presence of physical injuries, a police report written at the time of the offense providing further corrobative information, or just the fact of a fresh complaint.

   b. The deputy always has the option of referring the case to the police for further investigation. This will have to be done with some tact since the police are often reluctant to investigate domestic violence complaints. An interview with the defendant may often be warranted. This option might be used where the facts raise a question as to what really happened. This procedure will lessen the likelihood that the first person to the courthouse gets the complaint filed where the non-reporting party might be the actual victim.

   c. The deputy may always decline filing and allow the victim to sign the complaint herself. This may be done where the situation is one-on-one, and the deputy feels that the case is not fileable under office standards. The end result is the same since the case still proceeds to trial.

   NOTE: Filing standards are not inflexible, and exceptions may be made where necessary. Any questions should be addressed to the supervising deputy.

2. DEPUTIES: KNOW THE DIFFERENCE BETWEEN A MISDEMEANOR ASSAULT AND A FELONY ASSAULT! A critical part of the filing decision will involve the decision to file in district court as a misdemeanor or gross misdemeanor or to have the police prepare the case as a felony charge and submit it to the filing unit. The office standards provide that

all assaults with weapons or which result in grievous bodily harm shall be charged as Assault in the Second Degree. A weapon is any instrument or thing likely to produce bodily harm. RCW 9A.36.020(c). Grievous bodily harm is not critical injury, but is any serious hurt or injury that is seriously painful or hard to bear. It need not be permanent hurt or injury. Broken bones definitely qualify.

The judges in the district courts will encourage you to file these as misdemeanors. They feel that more punishment will result in the district. Keep in mind that the benefits we receive by filing the charge as a felony is a longer probationary period, i.e., a longer hold on the defendant. When in doubt, discuss the filing decision with a member of the filing unit to get a second opinion.

E. Initiating the Complaint

1. The victim will want to know what will happen if charges are filed. If the situation is not dangerous at the moment:

    a. a summons will issue for him to appear for arraignment--emphasize that he will not be arrested, i.e., he's going to receive the notice in the mail and may react with renewed violence.

    b. at an arraignment, he will enter a plea

    c. if he pleads not guilty, the case will be set for trial in about sixty days

    If the situation is still dangerous, i.e. she has satisfied you that she is in fear for her life:

    a. see the deputy and explain the situation

    b. have the deputy review the affidavit

c. if the affidavit is legally sufficient, complete a citation

d. the deputy will go before the judge and ask that a warrant issue for his arrest

e. explain that if the judge agrees, the defendant will be picked up by the police and brought before the judge

NEVER PROMISE A VICTIM THAT THE DEFENDANT WILL BE ARRESTED. Even if he is arrested, he will post bail and be out within hours. Urge her to formulate back-up plans should the defendant be released. Encourage her to stay with friends or have friends stay with her for a few days. Also, give her the address of Battered Women's Shelters in her area.

2. The No-Contact Order--this is the most important aspect of the new law. The legislature is taking the stance that the victim deserves to have the maximum protection afforded by the law. Go back to the law section as to who is eligible for protection.

   a. If a summons has issued, make sure that the deputy has the name of the defendant prior to arraignment--it's a good idea to keep a list of upcoming cases that will require no-contact orders.

   b. Determine if the victim wants a no-contact order--many victims will return home to the assailant or will wish the freedom to reconcile. We do not want to request no-contact orders when the order will have no meaning.

   c. Make a copy for the defendant and serve it on him before he leaves. Indicate on the record that the victim will receive a copy and a copy will be held by the police department in the same way as a warrant is held. Any violation, direct or indirect, will result in arrest and filing of a violation of the no-contact order. Mail a copy to the victim immediately. Call her and tell her that she will be receiving a copy.

d. Direct or indirect contact--not only is the defendant prohibited from going to see the victim, calling the victim, writing the victim, but he is also prohibited from having his friends call the victim for him. No contact means no contact.

e. If the defendant attempts to contact the victim by going to her house, instruct her that she need only call the police and indicate that she has a no-contact order. This will show up on the computer and the defendant will be arrested. Also the victim will have a copy to show the police. Urge her to call the police immediately.

f. If the defendant writes or calls the victim, instruct the victim to make notes on the calls and save any letters. Have her bring them into the district court and the deputy can file the violation of the no-contact order.

g. Violation of the no-contact order is a misdemeanor. We will prosecute any violation to the fullest extent. Any gross violation may result in the defendant losing his freedom pending trial.

F. Approaching Trial

1. The victim who remains willing to prosecute

a. This individual will require more of your time than any other witness. You may get impatient, and if you communicate that, you will increase the likelihood that she will back out.

b. Keep her informed of all aspects of the case--continuances, witnesses to be called by the defense, or last minute developments. Keep in constant contact with her.

c. Find some time to bring her in prior to trial if she seems apprehensive. Let her see the courtroom--explain what will happen. Go over her testimony with her. Deal with the fact that she is going to have to face this guy and tell the story.

d. Emphasize the importance of bringing a friend along for support. Try to establish contact with a friend of the victim, so if she wants to back out, you can enlist the friend's help.

e. If you've been able to convince the victim to contact Battered Women's Services, then she has an advocate. Keep in close touch with the advocate. There's no better team than an advocate, the legal assistant and the deputy. The advocate will accompany her to court.

f. If you're lucky, you'll make it to court, the case will be completed and you'll feel you've done a service for the victim.

2. The more common experience--"I've changed my mind"

    a. For every case that goes to trial, nine will result in a phone call either the day after filing or even the day of trial saying that she wants to drop charges.

    b. Explain that you understand her feelings, but the decision is no longer hers. Hit her with a few hard facts--he's done it before, and he'll do it again. Dropping the charges is a license to repeat. Don't come on with the tough prosecutor number. Avoid the lines that we can issue a warrant and have her arrested if she doesn't come to trial. She is a victim, not a criminal.

    c. If she persists in wanting to dismiss, make a deal. Tell her that we will not force her to testify (after all, what would that accomplish), but we won't dismiss until the time of trial. At that time, we'll discuss the case and if she will come to court and tell the court under oath that this wish is not the product of threat or coercion, then we will move to dismiss.

    d. Getting her to court accomplishes two things--you can observe her on the witness stand and satisfy yourself that she hasn't been threatened; you will also have one last change to talk about prosecution.

    e. If she takes the stand and states she wants the State to dismiss, then we will do so. One other benefit--the defendant must come to court. He will learn that the assault is a serious matter.

f. If the day of trial arrives and no victim--if the deputy has satisfied him/herself that no threat was involved, allow the court to dismiss. If s/he feels a threat has occurred, ask the court for one week to allow an investigation.

*Note: This is a change in policy. No longer will we threaten the victim with a material witness warrant. This only alienates the victim and communicates that she must play by our rules. There are too may stressful variables involved in the domestic violence situation to set up one additional stressful situation. The victim calls the shots. If she wants to go forward, we will use every resource. If not, the strong arm of the law will not be wielded against her.

3. Alternatives--the flexible approach

   a. The victim will often ask if her assailant will be sent to jail. She may not want this to happen. She may only be intersted in getting him some counseling. If you feel that she may drop charges if the case goes forward, suggest alternatives: agreement by State not to recommend jail, deferred sentence, continuing of trial date. Give the victim the opportunity to come to the sentencing and make her recommendations.

   b. You may also get an immediate call from the defendant or his attorney once charges are filed asking if there's any way to prevent the charge going on his record. We must use our judgment here. If he has priors, inform the defendant or the attorney that we will recommend a deferred sentence upon conviction or a plea. Upon successful completion of the conditions of the deferred sentence, the charge will be dismissed from the defendant's record. In rare situations when the defendant might suffer consequences even of a deferred sentence, suggest an alternative. If the defendant seems willing to undergo counseling, suggest that he go see a counselor for an evaluation and have the counselor make a report to you. If the counselor feels a program would be helpful, discuss this option with the victim. If this is agreeable, indicate that if the defendant enters counseling and continues until the trial date, then we'll reevaluate and consider a dismissal at the time of trial. This is to be used only in rare circumstances and only where the deputy is convinced that the defendant is sincere about working on the problem.

c. Be flexible. Remember that our goal is to effect a change in the cycle of violence. We can do that by prosecution, if the victim will cooperate. If not, we gain nothing by adopting a hard line. Think of creative ways to effect change.

G. Sentencing

1. No prior record

a. Recommend a deferred sentence--everybody deserves a chance to have a clean record.

b. If this assault was one of many as indicated by the victim, ask for jail time. We must emphasize the seriousness of the pattern of violence.

c. If physical injury resulted, ask for jail time. Let's say we're asking for suffering in return.

d. Always ask that the defendant undergo counseling.

e. If the victim wants nothing more to do with the defendant, ask for a no-contact order as a part of the sentence. Note that after a trial, such an order is simply a probation condition, and a violation of the order is not a separate crime. However, a violation may be grounds to revoke the probation.

2. Prior record including assault

a. Go for a big hammer. Ask for one year suspended on condition that the defendant serve a number of days depending on the severity of the assault.

   b. Ask for counseling. The prior record may indicate that counseling has been ordered without success. If so, increase the jail recommendation.

   c. If there is a subsequent violation, recommend that the suspension be revoked and the full jail term imposed. Take a firm stand--otherwise the hammer has no meaning.

3. General comments

   a. Sentencing is frustrating in domestic violence cases. Many judges don't take the cases seriously. Our recommendations must consistently communicate to the judges that the legislature takes the cases seriously and so do we.

   b. Be careful not to allow the victim to use the criminal courts as a way of gaining leverage in a civil suit, for example, a child custody hearing. If after investigating, you feel that this is the main thrust of the complaint, consider not filing.

H. Preliminary Appearance in District Court

1. In some district courts when a suspect is arrested on felony charges he or she is brought before the court to determine conditions of release:

   a. When the felony arose out of a domestic dispute, ask for a no-contact order as a condition of the suspect's release.

   b. Follow the same procedure as followed when obtaining a no-contact order at the arraignment.

   c. The no-contact order will be in effect until charges are filed and an arraignment is held in superior court.

d. If a no-contact order is filed in district court, notify the filing unit downtown that if charges are file, the arraignment deputy will need to file a new no-contact order with the felony charge.

e. This prevents two different courts from having claims on the defendant.

IV.. HANDLING THE AGONY OF DEFEAT

There is no other case which will result in more frustration for the team. In many instances, the case will be lost before it reaches court. The investment of time and energy will be great, and then the victim will decide that she does not wish to prosecute. This is not a defeat. Even though she terminates the case prior to trial, she has made great personal strides by making the report.

Domestic violence cases are difficult to understand, even for those with training and experience in the field. The typical attitude when the victim abandons the prosecutuion and returns to the abusive situation is that she deserves what she gets. As trained professionals, it is crucial to educate ourselves about the factors which influence the domestic violence environment. We must accept the fact that we may never be able to identify with the victim who returns to that environment, but we can still understand and withhold judgment. This ability is essential if we are to continue to sincerely deal with the victim who files, two, three or four times before every completing the process.

Our job is not to judge the victim according to our standards, but to handle every complaint with sincerity and professionalism. The domestic violence complaint is frustrating, but there is no greater service that we can do for the community. Through this avenue we can communicate to the community that the legal system can work for the individual.

Appendix F: Victim Information Sheets

This memo is given to battered women in Santa Barbara who file charges to explain to them how the criminal process works.

WHAT TO DO IF YOU HAVE BEEN HIT OR BEATEN

It is a crime to hit someone even if that person is part of your family. Call the Police by dialing 911, or call:

Santa Barbara Police - 965-5151
Carpinteria Policie - 684-4561
Lompoc Police - 736-8550
Santa Maria Police - 925-2631
Guadalupe Police - 243-2112
Santa Barbara County Sheriff
  Goleta - 967-5561
  Santa Maria -937-7261
Women's Shelter (24 Hr. Service):
  South County - 964-5245
  North County, Santa Maria - 922-8844
Helpline Counseling (24 Hr. Service) - 968-2556
Family Violence Unit of District Attorney's Office
  (ask for family violence assistance) - 963-6158
Attorney Referral Service - 962-8191
Legal Aid, Santa Barbara - 963-6754
  Lompoc - 736-6582
  Guadalupe - Same as Lompoc

Concerns of Violence Victims

Household violence is a problem in thousands of homes, we have been able to help in many. Because we have worked with numerous victims of these assaults, we have become aware of the concerns repeatedly expressed by them as court proceedings begin. Please discuss these concerns with the attorney or victim-assistant assigned to your case. We anticipate the following chief concerns:

Q: Will I be safe pending these proceedings?

A: The D.A. can request restraining orders for your protection from the judge, before, during or after arraignment. If you are fearful and wish such protection, call the D.A.'s office.

Q: What will happen to the offender if he/she is prosecuted?

A: Punishment, treatment or probation are possible upon conviction. A diversion from court proceedings is also available. If diverted, the offender suffers no conviction and no trial is necessary. In return, the defendant participates in counseling and must not reoffend.

The severity of the punishment and the defendant's eligibility for diversion both depend greatly on the offender's attitude and cooperation.

Q: Will I have to testify?

A: If the defendant pleads "not guilty," does not settle the case or is not eligible for diversion, there will be a trial. The victim of a

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crime is always subpoenaed to testify. A subpoena is a court order and not a matter of choice.

As a practical matter, however, very few cases actually go to trial. Although you may have to testify, it is unlikely. If the defendant or his attorney think they can persuade a victim not to testify, they are more likely to push a case to trial. Remember that a subpoena is a court order. By resolving to obey it and remaining available for trial, it is less likely that a trial will actually result.

What the Police Can Do

A police officer can arrest your attacker if you have been seriously injured and/or the attacker used a weapon and/or the crime was committed in the officer's presence.

Anytime a person is hit, beaten or assaulted, the attacker is committing a crime in that victim's presence. The victim has a legal right to make a citizen's arrest, and the police have a duty to take the attacker into custody. Any citizen can arrest another person who has committed a crime in his or her presence.

The police may ask if you wish to "press charges." What the officer means is, do you want to make a citizen's arrest and cooperate with the district attorney to help ensure your safety. The district attorney will press charges and sign the forms pressing charges. You will be asked to sign the citizen arrest form only.

The police will then report the facts as you tell them. To complete a thorough investigation, you may be asked to go the the police department to give a further summary of the facts, to have photographs taken or to give any other needed information. For your protection, it is important that you follow through with this as soon as possible.

Cite Release

Under our law an arrested person has a right to early release from jail because a person is considered innocent until proven guilty in court. The police officer may "cite release" the attacker unless there is a reasonable likelihood that the violence will be repeated. A "cite release" is like a traffic ticket promise to appear and means the attacker will not be taken to jail. If you fear another attack if the suspect is released, tell the police officer.

The arresting officer will then take the suspect to jail where again, the attacker may be cite released by jail personnel who may know nothing about the circumstances of the arrest. If you are fearful, you may wish to call the sheriff's department in your area (ask for Inmate Records) and tell them that you fear that, if the attacker is released, he may return to harm you. Or, you may call the District Attorney Witness Assistance Office and ask their help in doing so if the crime occurs doing office hours.

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The Process of Going to Court

You are encouraged to cooperate with the district attorney by following through with medical treatment, assisting in the investigation and remaining available for court procedures.

The following things will usually happen:

1) A complaint will be filed. The district attorney presses charges against people who have committed crimes. The final decision to press charges, dismiss charges, or settle cases is the district attorney's responsibility. Of course your interest, needs and desires are taken into account and considered in making such decisions. It is not necessary for you, as the victim to go to court unless requested by the district attorney. However, court hearings are public and you are invited to attend.

2) The defendant will be arraigned. The first appearance in court is called the arraignment. At this time, the defendant is advised of his constitutional rights. These rights include: (a) the right to an attorney, and a free attorney if the defendant cannot afford his own; (b) the right to a trial, by judge or jury whether or not the person is guilty. This choice is not yours. The defendant pleads "guilty" or "not guilty" at this time. If the plea is "guilty" the court must then decide the defendant's sentence. If the district attorney and the defense attorney agrees on what should happen, the court almost always permits that result. If the attorneys do not agree, then the court will decide. The possibilities are probation and counseling and/or punishment by fine or jail.

If the plea is "not guilty," two other hearing are set. A jury trial date is set about eight weeks away. A readiness and settlement conference is set one to two weeks before the jury trial. It is not necessary for you to come to this conference. The attorneys discuss the case and, if a settlement can be agreed upon, there will be no trial. If there is no agreement, the case remains set for trial, and you and any other witnesses will receive a subpoena to appear at the trial. You will only have to go to court if the plea is "not guilty," and the case is not settled at the readiness and settlement conference.

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Appendix G: Victim Notice of Criminal Protection Order Statute (Office of the Prosecuting Attorney, Seattle, Washington)

Arrests in Seattle lead to automatic filing of charges. The County Attorney sends this letter to battered women to inform them of their option to request that a protection order be issued while charges are pending.

OFFICE OF THE PROSECUTING ATTORNEY
KING COUNTY COURTHOUSE
516 THIRD AVENUE
SEATTLE, WASHINGTON 98104

NORM MALENG
PROSECUTING ATTORNEY

(206) 583-2200

Re: State v.
Charge

Police Department No.:

Dear

This office has recently filed a criminal case against the defendant noted above in which you were the victim. The defendant will be arraigned in approximately one week.

Pursuant to a new State Law, the case in which you are a victim is classified as a "domestic violence" case. In such cases, we can request that a judge issue an order requiring the defendant not to have any contact with you pending the trial and resolution of this matter. The violation of this order is a separate crime, prosecutable by this office. If you think that such an order is necessary in this case to keep the defendant from physically or mentally harassing or intimidating you, please notify me at the Victim Assistance Unit immediately--583-4441. You must be willing to abide by the order and will not be protected by it if you choose to initiate contact.

It is very important that you keep us informed about any change of address or phone number while this case is in progress. This information will be kept confidential. If you have any questions regarding this case, please feel free to contact me. You will also be receiving further information from this office including a restitution estimate of any damages.

Your cooperation and consideration is much appreciated.

For NORM MALENG, King County Prosecuting Attorney:

DIANE H. KAHAUMIA
Assistant Director
Victim Assistance Unit

Appendix H: Domestic Violence Disposition Guidelines Used by the Los Angeles City Attorney

SECTION SEVEN*:

DOMESTIC VIOLENCE DISPOSITION GUIDELINES

I. CHARGE REDUCTION

The decision to prosecute a crime case is a responsibility of a public prosecution agency, not the victim of the offense. Victims do not have the authority to "drop charges"; only the prosecutor can make application to the court for dismissal or seek the court's approval of an amendment to the original complaint for the purpose of a plea to a reduced charge.

Complaints filed in compliance with the Domestic Violence Filing Guidelines shall not be dismissed or reduced in the absence of compelling circumstances and supervisory approval. Persons charged with such crimes will be required to plead to the offense charged or proceed to trial.

It is the policy of the City Attorney's Office to oppose civil compromise pursuant to Penal Code sections 1377-78 in all domestic violence cases.

II. SENTENCE RECOMMENDATION

The defendant's participation in a court-approved counseling program will be recommended as a condition of probation in all cases. The court should require progress reports not less than every six months. Standard "force and violence" conditions of probation will also be recommended. If the victim sustained moderate or severe injuries or the defendant has been convicted or prior acts of domestic violence, the deputy city attorney will urge that an appropriate period of actual incarceration should be imposed.

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*Los Angeles City Attorney Criminal Branch Trial Manual, Chapter 5

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Appendix I: Diversion Petition and Order (Santa Barbara District Attorney's Office)

This form is used in Santa Barbara to request that prosecution of domestic violence cases be deferred pending completion of a counseling program.

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REQUEST JOB "Y" ON FAMILY VIOLENCE DISC.

STANLEY M. RODEN, DISTRICT ATTORNEY
County of Santa Barbara
By:
Deputy District Attorney
118 East Figueroa Street
Santa Barbara, California 93101
Telephone: (805) 963-6158

Attorneys for Plaintiff

IN THE __________ COURT, ____________________ JUDICIAL DISTRICT

COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff,) No.
)
v.) FAMILY VIOLENCE
) SUSPENDED PROSECUTION
Defendant.) TIME WAIVER AND COURT
____) ORDER

The District Attorney of Santa Barbara County and __________ ___________________________(hereinafter referred to as Defendant) agree as follows:

1. District Attorney will suspend prosecution and later dismiss the above entitled proceeding which is currently pending against defendant on condition that defendant enroll in, actively participate in and successfully complete the Family Violence Program (FVP). Criminal proceedings will be continued for a minimum of one year to permit participation in the Program. The exact dates will be set by the Court.

2. The defendant will attend Family Violence Program counseling and education sessions as directed by said Program. The times and places for such sessions will be arranged by FVP staff.

("Y-2")

Defendant agrees not to commit or attempt to commit any violent act against any person, including but not limited to the alleged victim in the above entitled case.

Defendant gives up or waives any right to confidentiality in counseling or education regarding the commission of or attempted commission of any violent act, committed after the date of the signing of this agreement, directed at any person, including but not limited to the alleged victim in the above entitled action. Such statements or other evidnece communicated to FVP staff and/or doctors, psychotherapists and counselors regarding such violent acts shall not be confidential and shall be admissible against defendant in any court of law where relevant.

Defendant understands and acknowledges that a violation of any condition of this agreement will immediately permit the District Attorney to place this matter on the Court calendar for resumption of criminal proceedings.

3. Defendant understands that (s)he has a right to have his/her case brought to trial within thirty (30) days from the date of arraignment if in custody at arraignment or within forty-five (45) days from the date of arraignment if not in custody at arraignment. Defendant understands that his/her case must be dismissed if not brought to trial within this time unless Defendant has consented to having the time extended.

Defendant hereby requests that the above entitled case be continued until ______________________________ so that (s)he may complete the Family Violence Program and waives his/her right to a speedy trial until twenty-one (21) days beyond that time.

///

("Y-3")

I have read and understand all of the terms of this contract. I knowingly, freely and voluntarily sign this agreement.

Dated this _________day of _____________________, 19_______ at Santa Barbara, California.

____
DEFENDANT

We concur:

____
ATTORNEY FOR DEFENDANT

____
DEPUTY DISTRICT ATTORNEY

The Court has read and considered the above agreement, the information in the Court's file and the information presented in Court in this matter.

GOOD CAUSE APPEARING, the foregoing agreement is acceptable to the Court and the matter continued to the date stated above under the terms of the agreement. Each party is obligated to carry out its provisions.

DATED: ___________________________.

____
JUDGE OF THE MUNICIPAL COURT

Appendix J: Termination of Diversion Form (Santa Barbara District Attorney's Office)

If a defendant violates the terms of diversion in Santa Barbara, this form is used to ask the court to resume prosecution.

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REQUEST JOB A ON FAMILY VIOLENCE DISC.

STANLEY M. RODEN, DISTRICT ATTORNEY
County of Santa Barbara
By:
Deputy District Attorney
118 East Figueroa Street
Santa Barbara, California 93101
Telephone: (805) 963-6158

Attorneys for Plaintiff

IN THE __________ COURT, _________________ JUDICIAL DISTRICT

COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. Defendant.	M.C. No. D.A. No. MOTION TO TERMINATE SUSPENDED PROSECUTION AND TO RESUME CRIMINAL PROCEEDINGS.

PLEASE TAKE NOTICE THAT ON ______________________________ or as soon thereafter as the matter may be heard in the above entitled court, the People will move to terminate Suspended Prosecution and to reinstate criminal proceedings. Said motion will be based upon the court files in ________________________________ and whatever other evidence that may be introduced at the hearing.

DATED: ________________________.

Respectfully submitted,

STANLEY M. RODEN, DISTRICT ATTORNEY

BY: ___________________________________
Deputy District Attorney

("A1")

ORDER

IT APPEARING TO THE SATISFACTION OF THE COURT that said defendant has violated the terms and conditions of suspended prosecution, it is hereby ordered that criminal proceedings be instituted.

DATED: ____________________________

JUDGE OF THE MUNICIPAL COURT

Appendix K: Petition for Expedited Prosecution (Santa Barbara District Attorney's Office)

If a complainant in a domestic violence case is threatened or if there are other reasons for expediting prosecution, this form is used to ask the court to speed up the proceedings.

REQUEST JOB N ON FAMILY VIOLENCE DISC.

________________________, DISTRICT ATTORNEY
County of Santa Barbara
By:
Deputy District Attorney
118 East Figueroa Street
Santa Barbara, California 93101
Telephone: (805) 963-6158

Attorneys for Plaintiff

IN THE ___________ COURT, ____________________ JUDICIAL DISTRICT

COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. Defendant.	)	M.C. No. D.A. No. APPLICATION FOR ORDER SHORTENING TIME; ORDER.

I am the attorney representing the People in the above entitled action. It is necessary that the time for service of the TITLE OF MOTION ____________________, supporting declaration and points and authorities in support thereof be shortened so that the same may be served not later than _____(#) days before the time set for the hearings of the motion because of the following facts:

(RECITE FACT JUSTIFYING APPLICATION OR REFER TO AFFIDAVIT ACCOMPANYING MOTION.)

Therefore it is necessary that this matter be heard at the earliest possible date.

I declare under penalty of perjury that the foregoing is true and correct. Executed this _______day of _______________,

_______, at __________________, ______________________.

____

Deputy District Attorney

ORDER

GOOD CAUSE APPEARING, IT IS ORDERED that the time for the service of the attached _______TITLE OF MOTION___________ the supporting declaration, and memorandum of point and authorities is shortened so that the same may be served on the defendant not later than ____(#) days before the time set for the hearing of the motion.

DATED:

____

JUDGE OF THE ____________COURT

Appendix L: Orders Imposing Conditions on Release in Lieu of or in Addition to Bail and a Contempt Motion (Santa Barbara District Attorney's Office)

The first form is used to impose conditions on the pretrial release of defendants in Santa Barbara who are released on their own recognizance.

The second form is used to impose conditions on the pretrial release of defendants in Santa Barbara in addition to the setting of bail.

Where conditions imposed on release are violated, the third form is used for a contempt motion to request that the defendant be held in contempt or that the amount of bail be increased.

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REQUEST JOB E4 ON FAMILY VIOLENCE DISC.

STANLEY M. RODEN, DISTRICT ATTORNEY
County of Santa Barbara
By: XX
Deputy District Attorney
118 East Figueroa Street
Santa Barbara, California 93101
Telephone: (805) 963-6158

Attorneys for Plaintiff

IN THE MUNICIPAL COURT, SANTA BARBARA-GOLETA JUDICIAL DISTRICT

COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,) M.C. No.
) D.A. No.
Plaintiff,)
)
v.) ORDER CONDITIONING
) DEFENDANT'S RELEASE
XXX) ON HIS OWN RECOGNIZANCE.
)
Defendant.)

GOOD CAUSE APPEARING, it is hereby ordered as a condition of defendant's release on his own recognizance:

_____ 1. Defendant shall not molest, threaten or harass ______________________.

_____ 2. Defendant shall have no contact with ______________________.

_____ 3. Other: ______________________
____
______________________.

DATES:

____
JUDGE OF THE ____________ COURT

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NOTE: REQUEST JOB N4 ON FAMILY VIOLENCE DISC.

________________________, DISTRICT ATTORNEY
County of Santa Barbara
By:
Deputy District Attorney
118 East Figueroa Street
Santa Barbara, California 93101
Telephone: (805) 963-6158

Attorneys for Plaintiff

IN THE ____________COURT, __________________JUDICIAL DISTRICT

COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	M.C. No. D.A. No.
v.	)	
Defendant.	)	SAMPLE ORDER CONDITIONING DEFENDANT'S RELEASE.

ORDER

GOOD CAUSE APPEARING, it is ordered pursuant to section 1269c of the Penal Code that the defendant (DEFENDANT'S NAME) while he is released on bail in the above entitled action:

(1) No contact directly or indirectly (VICTIM);

(2) Not be within 100 yards of (VICTIM'S) residence located at ______________________________;

(3) Not be within 100 yards of (VICTIM'S) place of employment located at ________________________; and

DATED: ____________________________.

____
JUDGE OF THE ______________COURT

REQUEST -- JOB D1 ON FAMILY VIOLENCE DISC.

_____________________, DISTRICT ATTORNEY
County of Santa Barbara
By:
Deputy District Attorney
118 East Figueroa Street
Santa Barbara, California 93101
Telephone: (805) 963-6158

Attorneys for Plaintiff

IN THE __________COURT, ________________JUDICIAL DISTRICT

COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff,) M.C. No.
) D.A. No.
v.)
) NOTICE OF MOTION TO
) FIND DEFENDANT IN
) CONTEMPT OF COURT OR
Defendant.) INCREASE BAIL.
_____________________________________)

PLEASE TAKE NOTICE that on ________________________________ or as soon thereafter as the matter may be heard in the above entitled court or to whatever other department that the case may be assigned, the People will move that defendant be found in contempt of court or that his bail be increased. Said motion will be based upon this notice, the attached affidavit of attorney, the attached points and authorities, the court files and whatever other evidence which may be introduced at the hearing.

DATED: ________________________________.

Respectfully submitted,

_______________,DISTRICT ATTORNEY

BY. ____________________________

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CWPS

Established in 1972 as a feminist policy research center, the Center for Women Policy Studies works to educate both the public and policymakers about the need for change in the legal, social, and economic status of women. In addition to its work related to women as victims of crime, projects of national significance have included a study of consumer credit for women, a book series through Sage Publications on women's policy studies, a study of female offenders, a study of on-the-job harassment, and research on programs and services for midlife and older women.

CWPS Publications on Family Violence

Legal Help for Battered Women, by Lisa G. Lerman. 1981, $1.50.

Written for battered women and service providers, this pamphlet describes the legal remedies available to battered women in many states. Lerman briefly discusses civil remedies including protection orders, temporary restraining orders, peace bonds, and divorce, as well as the criminal prosecution of wife beaters.

Wife Abuse in the Armed Forces, by Lois A. West, William M. Turner, and Ellen Dunwoody. 1981, $10.00.

Wife Abuse in the Armed Forces investigates the nature of spouse abuse in the military community and explores the response of military officials and service providers to the problem. The authors outline the family programs in each of the services and make recommendations for developing military spouse abuse programs. The monograph includes a discussion of the legal remedies available to battered military wives.

Cracking the Corporation: Finding Corporate Funding for Family Violence, by Margaret Dunkle. 1981, $5.00.

Cracking the Corporation, a guide to corporate fund raising for family violence programs, includes tips on finding corporate funding, a list of publications on corporate giving, a list of the Foundation Center's nationwide network of reference collections available for public use, and an article on seeking corporate funding for women's educational equity.